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LAW REPORTS.

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CASES DETERMINED IN THE COURTS OF PROBATE AND DIVORCE,

IN THE

ADMIRALTY AND ECCLESIASTICAL COURTS,

AND ON APPEAL THEREFROM IN THE

PRIVY COUNCIL,

AND IN THE

COURT OF APPEAL.

EDITOR—A. P. STONE, BARRISTER-AT-LAW.

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OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE

XLIX AND L VICTORIÆ.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Hon. Sir CHARLES PARKER BUTT, Knt.

JUDGES

OF

THE COURT OF APPEAL.

XLIX AND L VICTORIÆ.

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DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

XLIX. VICTORIÆ.

[IN THE CONSISTORY COURT OF LIVERPOOL.]

1885
Nov. 3.

IN RE ST. AGNES, TOXTETH PARK.

Faculty—Chancel Gates.

A faculty for chancel gates was granted, it being shewn that the chancel, from its richness, required protection.

APPLICATION on behalf of the incumbent and churchwardens of St. Agnes, Toxteth Park, Liverpool, for a faculty to place chancel gates of open metal-work between the chancel and the nave of the church of St. Agnes, Toxteth Park. The citation to lead the faculty recited (inter alia) that the gates were needful as a protection to the chancel and the ornaments thereof, and that they would be erected at the sole expense of H. D. Horsfall, one of the applicants. The gates in question were to be four feet in height from the level of the nave. The dwarf wall of the chancel was three feet high.

The application was not opposed.

Thurnam (solicitor), for the applicants. Chancel gates are legal, and it is only necessary for the applicants to shew a reason-

1885

IN RE ST. AGNES.

able ground for their erection; the object of the gates here is to protect the very costly chancel of this church; they are not for the purpose of any religious significancy.

[He referred to Burn's Ecclesiastical Law, 9th ed. p. 341; *Beal* v. *Liddell* (1); *Bradford* v. *Fry* (2); *In re St. Augustine, Haggerstone.* (3)]

DR. ESPIN (Chancellor). This is an application by the incumbent and wardens of the church of St. Agnes, Toxteth Park, who desire authority to erect chancel gates of open metal-work, according to a design by Mr. Pearson, R.A., which harmonises, as it seems to me, with the architecture of the church generally. The solicitor for the applicants has used sufficient arguments to satisfy me, if I had any doubt (which I have not) as to the power of the Court to authorize the erection of such gates. In fact, they are extremely common. I agree with Dr. Tristram, as reported in the case of *St. Augustine, Haggerstone* (3), that this is a matter for the discretion of the Court. The bishop has, I understand, recently visited the church, and concurs —in the special circumstances of the case—in the propriety of the erection of the gates. It must be understood, however, that this decision is not to be regarded as a general precedent. The great richness and excellence of the ornaments of the chancel, of the pavement of the chancel, and so on, seem to render some little protection necessary, or at any rate expedient. Then there is the fact, also, that the church is always left open for private prayer—a practice which this Court will do nothing to discourage. And it is possible that the organ may be there, and sight-seers might have access to it, unless it were protected as is proposed. Therefore, I think that there are sufficient reasons why this particular application should be sanctioned, and I decree the faculty as prayed.

Faculty granted in terms of citation.

Solicitor for applicants: *W. D. Thurnam, Liverpool.*

(1) Moore's Report of the Cases of *Westerton* v. *Liddell* and *Beal* v. *Liddell*. London: Longmans & Co., 1857, p. 77.
(2) 4 P. D. 93.
(3) 4 P. D. 111.

E. S. R.

THE CHEERFUL.

1885
Nov. 5.

Salvage—Success.

The *C.* broke down in the English Channel ten miles from Anvil Point, and was then in a position of risk, but not of imminent danger. The *H.* at her request took the *C.* in tow; near the Shambles the hawsers parted, and the *C.* then anchored and was in a position of considerable danger, greater than when the *H.* took her in tow. The *H.* was unable to make fast a hawser again, and in trying to do so came into collision with the *C.* The *H.* then left the *C.*, which was soon after taken in tow by two tugs and brought in safety to Portland :—

Held, that the *H.* was not entitled to salvage.

The India (1 W. Rob. 406) followed.

ACTION of salvage. The plaintiffs were the owners, master, and crew of the ss. *City of Hamburg* of 774 net and 1220 gross tonnage. On the 1st of February, 1885, about 10 P.M., the *Cheerful*, a vessel of 1014 tons gross register, lost her propeller in the English Channel about ten miles from Anvil Point, whilst on a voyage from London to Liverpool. The *City of Hamburg*, seeing the *Cheerful* burning blue lights and sounding her whistle, came up to her about 10·30 P.M. and was asked to tow the *Cheerful* into port, and the *City of Hamburg* thereupon took the *Cheerful* in tow. The weather at that time was bad, both the plaintiffs and defendants in their pleadings stating that there was a heavy sea with squalls and a gale from the south-west. It was alleged by the plaintiffs that if the *City of Hamburg* had not taken the *Cheerful* in tow, or some other vessel had not done so, she would have gone on to the coast to the northward, and so would have become a total wreck. The defendants, on the other hand, alleged that, though the *Cheerful* had broken down, there was no immediate danger of her going ashore, and that even without assistance it was not likely she would have done so. The *City of Hamburg* proceeded to tow the *Cheerful* towards Portland Roads, but when near the Shambles lightship both the hawsers parted. It was not alleged by the defendants that the parting was caused by any negligence on the part of the *City of Hamburg*. At this time the position of the *Cheerful* was one of considerable danger, and the weather was becoming worse. The *Cheerful* at this time, 3 A.M. on the 2nd of February, let go her anchor and the *City of*

1885

THE CHEERFUL.

Hamburg remained by her. About 7·30 A.M., at the request of the *Cheerful*, the *City of Hamburg* proceeded to steam across the bows of the *Cheerful*, from her port side, on which she lay, to her starboard side, with a view of dropping a life-buoy, and then sweeping a line across the bows of the *Cheerful* so as to get a hawser on board again. In so doing the *City of Hamburg* got out of command, became unmanageable, and was driven across the bows of the *Cheerful*, considerable damage being done to both vessels. The plaintiffs alleged that the *City of Hamburg* got thus out of command through being struck by a heavy squall. After a vain attempt again to get a hawser on board the *Cheerful*, the *City of Hamburg*, being herself in danger, bore away for Portland. About 9·30 A.M. a tug came to the assistance of the *Cheerful*, and with the assistance of another tug towed her to Portland Roads in safety.

The plaintiffs claimed salvage, the defendants denied their liability, and counter-claimed for the damage which the *Cheerful* sustained through the alleged negligent navigation of the *City of Hamburg*.

Sir W. Phillimore, and *Bucknill, Q.C.*, for the plaintiffs. The plaintiffs are entitled to salvage; they placed the *Cheerful* in a better position, by leaving her near Portland, than she was in when she was first taken in tow and assisted towards her ultimate safety, and therefore they are entitled to some reward: *The Atlas.* (1) There was a request for assistance on the part of the *Cheerful*, a rendering of such assistance, and therefore, even if the *City of Hamburg* did not contribute at all to the final safety of the *Cheerful*, having done her best she is entitled to salvage: *The Undaunted* (2); *The Melpomene* (3); *The E. U.* (4)

Myburgh, Q.C., and *Kennedy, Q.C.*, for the defendants. Success alone can justify the Court in awarding salvage: *The India* (5); *The Camellia* (6). The *City of Hamburg* so far from making successful efforts left the *Cheerful* in a worse position than she found her in, therefore the Court should not award salvage to her. The defendants are entitled to damages for the injury

(1) Lush. 518.
(2) Lush. 90.
(3) Law Rep. 4 A. & E. 129.
(4) 1 Spinks, 63.
(5) 1 W. Rob. 406.
(6) 9 P. D. 27.

done to the *Cheerful* by the negligent navigation of the *City of Hamburg*.

Sir W. Phillimore, in reply.

BUTT, J. (after stating the facts of the case, proceeded:—) Several questions of importance have been raised in this case. First of all, it is necessary to consider the amount of danger in which the *Cheerful* was at different periods of the time in question. Unquestionably when she broke down off Anvil Point there was some risk. But the Elder Brethren advise me that there was then no imminent risk of her going ashore. There is no doubt that after the hawsers had parted in the neighbourhood of the Shambles, and after the *Cheerful* had been brought to anchor, she was in a position of very considerable danger. That danger was augmented by the accident which afterwards occurred to the vessel by collision, and the Elder Brethren advise me that the position in which the *Cheerful* lay when the *City of Hamburg* left her was one of considerably greater danger than that in which she was when she was first taken in tow. That being so, the question arises whether the owners, master, and crew of the *City of Hamburg* are entitled to salvage remuneration. I am reluctant to decide such a case as this against the salvors, but I feel constrained to abide by what, in my opinion, is the law which has been laid down in the authorities on this question. I must hold, to quote the language of Dr. Lushington in *The India* (1), that "unless the salvors by their services conferred actual benefit on the salved property, they are not entitled to salvage remuneration." It follows from what I have said that no actual benefit was conferred on this vessel by the services rendered by the *City of Hamburg*, because the *Cheerful* was left in a position of greater danger than she occupied before those services. In dealing with the relative amount of danger, the Elder Brethren and I have not forgotten the fact that she was left near Portland Harbour, where tugs can be obtained.

As regards the counter-claim, it has been urged on behalf of the *Cheerful* that the manner in which the *City of Hamburg* was manœuvred with a view of getting a line on board the *Cheerful*

(1) 1 Wm. Rob. 406.

1885

THE CHEERFUL.

was negligent. I have asked the Elder Brethren their view of the subject, and though they are inclined to think that greater care and greater skill might have been used, and thus that the collision might have been avoided, yet, having regard to the exigencies of the position, the danger in which the *Cheerful* was placed, and the request to perform some such manœuvre, they advise me that the failure to perform that manœuvre without damage does not constitute negligence. Both claim and counter-claim will therefore be dismissed. I make no order as to costs.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Pritchard & Sons.*

E. S. R.

Nov. 12.

[IN THE COURT OF APPEAL.]

THE TEMPLE BAR.

Practice—Admiralty Action—Rules of the Supreme Court, 1883—*Order XXXVI., rr.* 4, 6, 7*a.*

The plaintiff in an action in rem for disbursements in the Probate, Divorce, and Admiralty Division, applied for an order that the action should be tried by a judge with a jury. The district registrar refused to make the order, and Butt, J., upheld his decision:—

Held, affirming the decision of Butt, J., that Order XXXVI., r. 6, gives no absolute right to a jury in actions which before the passing of the Judicature Act, 1873, would have been tried without a jury; that the case fell within Order XXXVI., rr. 4 & 7a, and that the judge had a discretionary power only, to allow trial by a jury.

ACTION in rem for disbursements. The plaintiff was the late master of the barque *Temple Bar*. The statement of claim alleged that the plaintiff made necessary and proper disbursements on account of the *Temple Bar* to the extent of 466*l.* It further alleged that the plaintiff drew a bill on R. M. C. Stumbles for the amount of such disbursements in favour of the persons to whom the sum was due, but such bill was dishonoured, and that the plaintiff was liable on such bill, and that an action had been brought against him. The place of trial was Liverpool.

The defendant, after denying the allegations in the statement of claim, pleaded in the alternative that the plaintiff ought not

to be admitted to say that 466*l.* was due to him, as, after he had made the disbursements in question, and after he had become liable on the bill and knew of his liability, and after an action had been commenced against him on this bill, he gave to one Stewart, the defendant's predecessor in title, a receipt for 146*l.* in full satisfaction of all his claims for liabilities against the *Temple Bar*, "$\frac{\text{and}}{\text{or}}$ her owner $\frac{\text{and}}{\text{or}}$ G. C. Stewart, first mortgagee in possession." The defendant further alleged that he bought the *Temple Bar* relying on this memorandum, and that when he bought the *Temple Bar* he was without notice of the matters alleged in the statement of claim. The defendant also denied his personal liability for the claims, and pleaded that they were satisfied by Stewart, and also that the plaintiff had lost his claim by laches.

On the 31st of October notice of trial by a judge at the next Liverpool Assizes was given by the plaintiff. On the 4th of November the plaintiff applied to the district registrar at Liverpool for an order that the trial should be by a judge and jury, which was refused. On the 10th of November the plaintiff appealed against this order to Butt, J., in chambers, who confirmed the district registrar's decision.

The plaintiff appealed.

Danckwerts, for the plaintiff. Under Order XXXVI., r. 4 (1) it is discretionary in the judge to order a trial without a jury, and unless some good cause is shewn the plaintiff is entitled to a

(1) Rule 4. "The Court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Principal Act could, without any consent of parties, have been tried without a jury."

Rule 6. "In any other cause or matter, upon the application of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury."

Rule 7a. "In every cause or matter, unless under the provisions of rule 6 of this order a trial with a jury is ordered, or under rule 2 of this order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury; provided that in any such case the Court or a judge may at any time order any cause, matter, or issue, to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors."

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trial with a jury: *Hunt* v. *Chambers*. (1) On the pleadings this is essentially a case for trial by jury, so that there is no reason against such mode of trial. Further, Order XXXVI., r. 6, applies to this case, and under it the plaintiff is entitled as of right to a trial with a jury. He would have had such a right had the action been set down for trial in London before the judge sitting in Admiralty.

Pyke, for the defendant, was not called on.

LORD ESHER, M.R. This is an Admiralty action in rem brought in the Admiralty Division, but with the venue laid at Liverpool. If no other rules were applicable to it, it would fall within Order XXXVI., r. 7a, and would be tried without a jury, unless cause were shewn why it should be tried with a jury. But the plaintiff applied for a jury under Order XXXVI., r. 6, and it was argued that the judge had no discretion in the matter, but was bound absolutely to make an order for a trial with a jury. To prevent such an application of Order XXXVI., r. 6, rule 4 of the same order was passed, and this is such an action as falls within that rule, being an action for disbursements, which would before the passing of the principal Act have been tried in the Admiralty Court without a jury. Therefore rule 6 does not apply to this case. Accordingly the application was made under Order XXXVI., r. 7a, and then it is a matter within the discretion of the judge, and the burden of proof lies on the applicant to shew why he should have a jury. In this case that burden was not discharged. The importance of the plaintiff's contention to day lies in the fact that, if it were correct, a party in a collision or salvage action in the Admiralty Court might now insist as of right on having a jury. An application may yet be made under rule 7a to the judge at Liverpool, but he will, in my opinion, certainly not grant it. The appeal must be dismissed with costs.

COTTON, L.J. I am of the same opinion. It has been contended that the plaintiff has an absolute right to have this case tried by a judge and jury, and it is claimed by virtue of the

(1) 20 Ch. D. 365; also sub nom. *In re Martin*.

provisions of Order XXXVI., r. 6. But this rule begins with these words, "In any other cause or matter," and these words at once make us inquire what those other causes or matters are, for these words exclude them from the operation of rule 6. The cases referred to in rule 5 are intended to be excluded from the operation of rule 6, and they are so excluded by reason of the words at the beginning of the latter rule. Rule 4 deals with cases which would, before the Judicature Acts, have been tried without a jury without the consent of the parties, and they are consequently excluded from the operation of rule 6 by the words which I have already read from that rule. The result is that parties have no right to a jury when the cause or matter is one which is excluded from the operation of rule 6 by being included in the words "any other cause or matter." It was then asked what is the use of rule 4, but it seems to me that that rule has reference to matters comprised in rule 7, and may have been inserted to enable a judge to order a trial by jury in cases in which, perhaps but for it, there might have been some doubt whether he had the power to make the order. The case of *Hunt* v. *Chambers* (1), which was relied on, was decided on the rules of 1875, rules different from those now in force and under which the rights of the parties were different, so that it can have no bearing on the present case. The result therefore, is, that the plaintiff is not entitled as of right to a jury, and the appeal must be dismissed.

LINDLEY, L.J. Rules 2–7 of Order XXXVI. form a small group by themselves, dovetailed and hanging together, and requiring to be read together. Before the passing of the Judicature Acts two kinds of actions existed, those with juries and those without juries. The latter were such as were tried in the Admiralty Court. In the rules passed after the Judicature Acts became law, it was necessary to provide for both kinds of actions. Therefore where before the Act of 1875 parties had a right to a jury they have it now. Here, however, we have an action in which no such right previously existed, and the question is whether in all cases a right to a jury exists. It has been argued that it

(1) 20 Ch. D. 365.

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does. That depends on rule 6, but the words "other cause or matter" in that rule refer to causes other than those referred to in rule 4. So that rule 6 has no application to such a case as this. It follows therefore that this case is within rule 7a, which allows a judge, in his discretion, to direct that a party may have a jury in cases in which parties previously had no such right.

Appeal dismissed.

Solicitors for plaintiff: *Pritchard & Sons.*
Solicitors for defendant: *Gregory & Co.*

E. S. R.

Dec. 4.

THE HERCULES.

Practice—Sale of Foreign Ship—Ord. L., r. 2.

The Court ordered the sale of a foreign ship on the report of the marshal that it was desirable she should be sold, and subject to the filing of an affidavit, verifying the cause of action and stating that no appearance had been entered.

MOTION by the plaintiffs for the appraisement and sale of the Norwegian vessel *Hercules*. The plaintiffs had begun an actio in rem against the *Hercules* for damage by collision, she was arrested on the 29th of October, 1885, but no appearance had been entered.

The marshal had made a report to the effect that the *Hercules* was an old and worn-out vessel of 683 tons, built in 1841; that she had been damaged in the collision, and was not worth more than 200*l.*, and that it was desirable that she should be sold to avoid expense and further deterioration.

Stubbs moved according to the terms of the notice of motion.

[BUTT, J. Have you an affidavit verifying the cause of action; the affidavit to lead the warrant in the ordinary form merely states that there has been a collision, and that the plaintiffs have not been paid damages?]

Stubbs. An affidavit is not necessary, the report of the marshal affords sufficient ground to enable the Court to exercise its powers.

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BUTT, J. I cannot grant an application to sell a foreign ship on such materials as are at present before me. But I will make the required order, subject to the plaintiffs filing an affidavit in the registry, verifying their cause of action, and stating also that an appearance has not been entered on behalf of the ship.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*

E. S. R.

NEWTON *v.* NEWTON.

Applied. SCOTT *v.* SCOTT. 2 All E.R. 1154.

Applied. SCOTT *v.* SCOTT [1951] P. 193

[1950] *Nov.* 4.

Alimony pending Suit—Injunction.

The Court will not, in order to protect a wife's right to alimony, restrain a husband from removing his property out of the jurisdiction of the Court before an order for alimony has been made.

THIS was a petition for restitution of conjugal rights, to which the husband had filed an answer denying the refusal to cohabit, and asserting that the petitioner had instituted another suit in America, which was still pending, for dissolution of marriage, and that the respondent was an American citizen, and that therefore the English Court had no jurisdiction.

A petition for alimony pending suit had been filed, to which the respondent objected by reason of the want of jurisdiction, and that the American suit was pending; but upon the petitioner proving that no alimony had been awarded in America, and upon her withdrawing that suit, the Court ordered the respondent to file an answer to the petition for alimony, but no alimony had yet been awarded.

On the 31st of October, an order was obtained restraining the respondent, until the 3rd of November, from moving any of his property out of the jurisdiction.

Nov. 3. *Bayford, Q.C.*, and *Barnard*, moved to continue the injunction. The Judicature Act, 1873, s. 25, sub-s. 8 (1); *Sidney* v. *Sidney* (2); *Noakes* v. *Noakes and Hill.* (3)

(1) The following are the material portions of the section referred to:—

"An injunction may be granted.... by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made."

(2) 17 L. T. (N.S.) 9.

(3) 4 P. D. 60.

1885

NEWTON v. NEWTON.

Murphy, Q.C., and *Pritchard, contrà*. The Court has no greater power since the Judicature Act than the Courts had before: *North London Ry. Co.* v. *Great Northern Ry. Co.* (1) There is no alimony due, as no order has been made. The Courts never could grant an injunction except to secure alimony then due.

Cur. adv. vult.

Nov. 4. SIR J. HANNEN (President). The alleged facts are these:—The petitioner, the wife, instituted proceedings in a matrimonial case against her husband in the United States, and he thereupon removed his property from that country to this, for the purpose, as it was said, of defeating any claim upon him which the wife might substantiate. He came to this country, and the wife also came here and instituted proceedings; and afterwards abandoned her proceedings in the United States.

It was alleged that he was about to remove his property from this country, as it was said he had done from the United States, and I was asked to grant an injunction restraining him from so doing. In answer to that application it was argued that the Court had no authority to make the order prayed for.

In support of the application two cases were cited, the one of *Sidney* v. *Sidney*, decided by Malins, V.C., in 1867 (2), and the other, a case decided by myself, *Noakes* v. *Noakes and Hill*, in the year 1878. (3)

With regard to the first of these cases, *Sidney* v. *Sidney* (2), it was one in which the decree absolute for a dissolution of marriage had been pronounced, and the Court had ordered permanent maintenance to the amount of 245*l.* a year to be secured to the petitioner, and a reference to one of the conveyancing counsel of the Court of Chancery to settle a proper instrument to be executed by the respondent so as to carry out the order, and an application was afterwards made to Malins, V.C., to restrain the husband from dissipating his property for the purpose of putting it out of the control of the Court. It is to be observed that in that case there was, what there is not in this case, a subsisting order for the payment of the annuity. The application therefore to the Vice-

(1) 11 Q. B. D. 30.

(2) 17 L. T. (N.S.) 9.

(3) 4 P. D. 60.

Chancellor was for the purpose of enforcing that order, and it was similar to, though it was not actually, the process in execution of the order which had already been made by this Court. In that it is distinguished from the present case.

In the case of *Noakes* v. *Noakes and Hill* (1) there had been a decree nisi for the dissolution of the marriage, and an order obtained to vary the post-nuptial settlement, but there had been no order for the payment of any fixed sum. That case, no doubt, resembles the present, but it is to be observed that the point was not taken before me, and my attention undoubtedly was not called to it, and therefore, in effect, I am now called upon for the first time to decide the broad question of law which has been raised by the respondent.

No other authority having been cited, and as I have myself not been able to find any other authority in support of the proposition advanced on the part of the petitioner, I come to the conclusion that as it has been decided that the Judicature Act does not give any enlarged powers to the Court in this respect, it is not competent for a Court, merely quia timet, to restrain a respondent from dealing with his property. The case would be different, of course, if the circumstances were the same as in *Sidney* v. *Sidney*. (2) In that case that decision would be binding on me.

I therefore dissolve the injunction, but as I think the application was reasonable, I allow the wife her costs.

Solicitors for petitioner: *Wontner & Co.*

Solicitors for respondent: *G. S. & H. Brandon.*

(1) 4 P. D. 60.

(2) 17 L. T. (N.S.) 9.

R. A. P.

1886
Jan. 11.

THE HARVEST.

Collision—Bye-laws for the Regulation of the River Tyne, 1884—*Bye-law* 20.

A collision occurred between the *S.*, which was leaving the Tyne, and the *H.*, which was entering it, about two cables length outside the south pier, and to the south of the line of mid-channel. The *H.* at the time of the collision was proceeding to get from the south of the line of mid-channel to the north of the line, to proceed up the river on the north side:—

Held, that the *H.* was to blame, as she had infringed bye-law 20 of the Regulations of the River Tyne, 1884, the meaning of which is that a vessel is not to cross from north to south or south to north close up to the pierheads, but is to get on a proper course when at some considerable distance outside the pierheads.

Action for damage by collision between the steamship *Stainsacre* and the steamship *Harvest*. The collision occurred on the 30th of November, 1885, about 11 p.m., off the entrance to the river Tyne, about two cables length outside the piers and to the southward of the line of the leading lights. It was alleged by the plaintiffs, the owners of the *Stainsacre*, that she was proceeding down the Tyne on her outward voyage, and after passing the Herd Buoy, and as she was approaching the South Pier, she was well over to the south side, going at the rate of five to six knots an hour, and having her regulation lights brightly burning and a proper look-out. Then the red light of the *Harvest* was seen about three points on the starboard bow of the *Stainsacre*, and about one mile distant. The *Stainsacre* was kept heading E. ½ S., on the course which she had been steering to leave the harbour, until she had cleared the end of the south pier. Then her helm was put hard-a-port, but shortly afterwards two short blasts of a steam whistle was heard from the *Harvest*. On getting this signal, the helm of the *Stainsacre* was put hard-a-starboard, and two short blasts of her whistle were blown. Immediately after, the red light of the *Harvest* alone continuing in sight, the engines of the *Stainsacre* were put full speed astern and three short blasts were blown on her whistle, but the *Harvest* came on and with her stem and starboard bow struck the starboard side of the *Stainsacre* a little abaft the forerigging, doing the *Stainsacre* great damage, in consequence of which she sank in five minutes.

It was alleged by the *Harvest* that she had arrived off the

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THE HARVEST.

Tyne, and was proceeding to enter the river, having the two leading lights in a line on a bearing of W. ¾ N.; that her regulation lights were burning brightly, and that she had a good look-out, when the masthead and port lights of the *Stainsacre* were seen leaving the river nearly ahead, but a little on the port bow and distant about one mile. The helm of the *Harvest* was then ported, so that the vessels were in a position to pass port to port. The *Stainsacre* seemed to be coming too near the *Harvest*, and therefore the helm of the latter vessel was ported a little more, when the *Stainsacre* suddenly shut in her red light and opened her green. The helm of the *Harvest* was then put hard-a-port, and one short blast was blown on her whistle; immediately after the engines of the *Harvest* were put full speed astern, and three short blasts were blown on her whistle, but the *Stainsacre* struck the stem of the *Harvest* near her starboard side about midship.

Dec. 21, 1885 and Jan 11, 1886. The case was heard and evidence taken.

In addition to the questions of fact raised in the cause, it was contended on behalf of the *Stainsacre* that the *Harvest* had infringed bye-law 20 of the bye-laws for the regulation of the River Tyne (1), on the ground that though the collision took place just outside the piers, yet that this bye-law applied to vessels outside, as well as inside the piers.

Sir W. Phillimore, and *Barnes*, for the plaintiffs.
Raikes, and *Stokes*, for the defendants.

BUTT, J. This was a collision between two steam vessels, the one leaving and the other entering the Tyne, on the night of the 30th of November, about eleven o'clock. The Tyne Commissioners have, by authority, issued certain bye-laws for the governing and directing of the navigation of their port, and that which

(1) Code of Bye-laws for the Regulation of the Port and of the Northumberland and Albert Edward Docks and the River and Dock Staiths belonging to the Tyne Improvement Commissioners, 1884.

Bye-law 20: "Every steam or other vessel (whether towing any other vessel or not, or being towed) shall, unless prevented by stress of weather, be brought into the port to the north of mid-channel, and be taken out of the port to the south of mid-channel.

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is most material to the present case is No. 20. I understand this rule to mean, that a vessel about to enter the Tyne coming from the southwards, is not to cross from the southwards to the northwards close up to the pierheads. She is to get on to a course, which will take her up the river, when she is some considerable distance outside the piers. The reason for such a regulation is obvious. It appears to me, and the Elder Brethren agree with me, that the main cause of this collision, I do not say the proximate cause, was that the *Harvest*, instead of keeping out to sea till she had passed the line of the mid-channel course out of the river, crossed the line too near in to the pierheads. This I find as a fact. She thus brought about a position of danger which, with other circumstances, caused the collision. It took place some two or two and a half cables length outside the pierhead. The wreck of the *Stainsacre* lay in a position decidedly to the south of mid-channel. But it has been said that though this is or was the position of the wreck, it was not the place of the collision, because the tide carried the vessel down and that this accounts for her lying so far to the south. All the witnesses from the *Stainsacre* say that the collision occurred to the south of mid-channel; on the other hand, all those from the *Harvest* say that it was to the north of mid-channel. But I cannot accept the story told by the master of the *Harvest* as true; I cannot accept his evidence as to the speed of his vessel. I do not believe that he is correct when he says that the *Harvest* had stern way on her at the time of the collision. I am, therefore, not predisposed to accept his evidence as to the position in regard to mid-channel in which the collision occurred. He was asked by Sir Walter Phillimore to take the position in which he says his vessel was at a certain point down the coast, and lay the course which he steered from that point. The chart which he then marked shews that he was within some three or at most three and a half cables length of the entrance of the harbour at the time when his course intersected the line of the leading lights, though his statement was that he had got on the line a mile and a half or two miles outside and was complying with bye-law 20. Making all proper allowances, the master must, on his own shewing, have been a good deal nearer to the mouth of the harbour, than he says he was when he altered or began to

1886

THE HARVEST.

alter his course. This points to the conclusion that the *Harvest* infringed bye-law 20, and the position of the wreck leads to the same conclusion. The evidence of Blair, a pilot, confirms me in this opinion, and I hold, therefore, that the *Harvest* disobeyed bye-law 20. [The learned judge then examined the evidence as to whether the *Harvest* had a masthead light exhibited, and as to the starboarding of the *Stainsacre*, and concluded:—] I have, therefore, come to the conclusion that the real cause of the collision was the violation by the *Harvest* of bye-law 20, that the absence of her masthead light also conduced to the collision, and that the *Stainsacre* is not in fault. I pronounce the *Harvest* solely to blame.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Turnbull, Tilly, & Mousir.*

E. S. R.

THE COLONSAY.

1885
Dec. 15.

Bail—Sale—Marshal's Fees—Mortgagees.

The *C.* was arrested in an action for necessaries supplied by the plaintiff. The owners appeared but did not give bail or deliver pleadings. The mortgagees of the *C.* intervened, and took possession under the mortgage, but the *C.* still remained in the custody of the marshal, and was subsequently sold by him under an order of the Court obtained by the interveners. Judgment with costs, by consent, for the interveners, was afterwards entered. Under it the interveners claimed from the plaintiff the amount due to the marshal for the expenses of the sale:—

Held, that as the interveners, though able to obtain the release of the *C.* by giving bail had not done so, but had obtained an order for the sale of the *C.*, and had received the proceeds of such sale, they must bear the expenses of it.

APPEAL from a report of the assistant registrar in an action in rem against the ship *Colonsay* for necessaries supplied to her by the plaintiff. The *Colonsay* was arrested, and the owners of the *Colonsay* appeared, but did not give bail or deliver pleadings. After the arrest Kelly & Co., mortgagees of the *Colonsay*, intervened and took possession of her for principal and interest. The plaintiff refused to release the *Colonsay*, alleging that he had a prior claim to the mortgagees. Subsequently the interveners obtained from the Court an order for the sale of the ship, and she was accordingly sold by the marshal and was bought by the

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THE COLONSAY.

interveners' agent, the purchase-money being paid out to them again on their paying into court a sum sufficient to cover the amount of the plaintiff's claim and costs, and of the marshal's charges and expenses. The plaintiff required the interveners to prove their case, but two days before the time fixed for the trial of the action, the plaintiff consented to judgment being entered for the interveners with costs, which was accordingly done. The interveners subsequently received out of court the sum which they had paid in, less the sum of 370*l.* 1*s.* 10*d.* for the marshal's fees and expenses. The assistant registrar considered that the interveners were liable for this sum less a sum of 17*l.* 15*s.*, the possession fee, which he considered the plaintiff should pay as having been incurred for his sole benefit. The interveners appealed to the judge in Chambers, and the appeal was adjourned into Court.

Bucknill, Q.C., for the interveners. The mortgagees are entitled to be repaid the marshal's fees and expenses by the plaintiff; it was the plaintiff who by continuing his action obliged the interveners to obtain an order for the sale of the ship. The sale was for the benefit of all concerned, not for the sole benefit of the interveners. The plaintiff as against the interveners failed in his action and so ought to pay all the costs which were reasonably incurred by the interveners.

Sir W. Phillimore, for the plaintiff. The plaintiff ought not to have to pay the costs of the sale. The order for the sale of the ship was obtained by the interveners, and sooner or later, in order to realise their security, they must have sold the ship. The plaintiff was justified in requiring the interveners to prove their title, and that they were entitled to the whole of the ship. The interveners might have given bail for the amount of the plaintiff's claim and so have prevented the sale, but they refused to do so.

Bucknill, Q.C., in reply. The defendant in an action is not bound to give bail, and so it was not unreasonable for the interveners to obtain an order for the sale.

BUTT, J. This is a case in which the plaintiff claimed a sum for necessaries supplied to the ship *Colonsay*. There was no denial

of his claim, and it must therefore be taken that he had a perfectly good claim against the owner But the real defendants are certain mortgagees whose claim takes priority over that of the plaintiff. The ship was arrested by the plaintiff, and afterwards the mortgagees, who intervened, applied for an order for the sale of the ship, which was granted. The question which I have now to decide is whether the expenses of this sale are to be paid by the plaintiff or by the mortgagees. The assistant registrar has disallowed the mortgagees the marshal's fees and charges, except the possession fees, on the ground that the ship was sold on the application and apparently for the benefit of the mortgagees. If the latter had wished that the ship should not be sold they could have given bail. It is not suggested that they were unable to do so, but they did not choose to take this course. I am now asked to say that they, with the proceeds in their pockets, are not to pay the expenses of the sale. I see no reason to reverse the assistant registrar's decision. The mortgagees must bear these expenses.

Appeal dismissed with costs.

Solicitors for plaintiff: *Wynne, Holme, & Wynne.*
Solicitors for interveners: *Phelps, Sidgwick, & Biddle.*

E. S. R.

1886
Jan. 27.

THE GODIVA.

Practice—Rules of the Supreme Court, Order XIX., r. 28—Preliminary Act—Amendment.

Art. IX. of the preliminary act on behalf of the defendants was ordered to be amended, as it did not contain a proper statement of the distance and bearing of the other vessel in accordance with Order XIX., r. 28 (i).

ACTION of damage by collision.

Sir W. Phillimore, and *Raikes*, for the plaintiffs.

Bucknill, Q.C., and *Aspinall*, for the defendants.

Raikes applied that art. IX. of the preliminary act on behalf of the defendants should be amended, on the ground that it did not give the full information to which the plaintiffs were entitled.

Article IX. is as follows: "Distance and bearing of the other vessel when first seen." The statement on behalf of the defendants was: "The *Lobelia* when first seen was at anchor."

BUTT, J. In these cases when I find the question in the preliminary act improperly answered, I am disposed to view the case of the party so answering with suspicion. The parties are entitled to have the question in the preliminary act answered fully. If the answer is intentionally imperfect, then I look upon it as an attempt to mislead. Article IX. must therefore be amended.

Article IX. of the preliminary act was then amended by the addition of the words, "distant about two miles nearly ahead, but on the port bow withal."

Solicitors for plaintiffs: *Waltons, Bubb, & Johnson.*

Solicitors for defendants: *Parker, Garrett, & Parker.*

E. S. R.

THE TURGOT.

1886
Jan. 16.

Charterparty—Necessaries—Master's Claim—Charterer—Owners—Authority of Master—Double Pay—17 & 18 *Vict. c.* 104, *s.* 187.

By charterparty it was agreed that the owners of the ship should provide and pay for provisions and wages, and that the charterer should provide and pay for coals and other expenses. The master was to be appointed by and was to follow the instructions of the charterer.

The master, with notice of the charterparty, ordered and made himself liable for provisions and coals for the vessel at a foreign port. These provisions and coals were necessary to enable the vessel to perform her voyage:—

Held, in an action by the master against the vessel, that he was entitled to recover for the provisions but not for the coals, as by the terms of the charterparty he had no power to pledge the owner's credit in respect of them.

ACTION in rem for wages and disbursements. The plaintiff was master of the steamship *Turgot* from the 5th of April, 1884, to the 25th of March, 1885, and during that period, upon the order of the plaintiff, to enable the *Turgot* to perform her voyage, necessaries were supplied by Messrs. Tramontana, of Palermo, and Messrs. Agnis & Co., of Malta. For the amount due to the first named, in respect of pilotage, payment for mooring and provisions, judgment had been recovered against the plaintiff with costs.

For the amount due to the second named for coals, provisions, and advances, the plaintiff had also been pronounced liable to pay. The plaintiff further claimed ten days' double pay under 17 & 18 Vict. c. 104, s. 187. (1)

The defendants denied the plaintiff's claim on the ground that

(1) Sect. 187. "The master or owner of every ship shall pay to every seaman his wages within the respective periods following: (that is to say,) in the case of a hometrade ship . . . . and of all other ships (except whalers, &c.), within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall at the time of his discharge be entitled to be paid on account a sum equal to one-fourth part of the balance due to him; and every master or owner who neglects or refuses to make payment in manner aforesaid, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods aforesaid, and such sum shall be recoverable as wages."

1886

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during the period above mentioned the *Turgot* was under a time charter to one Robertson, and that by the terms of the charter-party, of which the plaintiff had notice, the charterer was to provide and pay for all coals and fuel, steam engines, port charges, and expenses, and the master was to be, and was in fact, appointed by the charterer, and acted solely as his agent.

From the evidence of the master it appeared, as regarded the expenses at Malta, that the *Turgot* was in quarantine, and that as the master needed coals, provisions, and wages, they were supplied to him on his order, and on account of the charterer. But when about to sail Messrs. Agnis & Co. (being aware that the charterer was insolvent) refused to allow the ship to sail unless the plaintiff drew a bill on his owners; they told him at the time that they had instructions from the owners to this effect. One of the owners when called denied that they had sent Messrs. Agnis any such instructions. As to the claim for double pay, the plaintiff was dismissed on the 25th of March, previous to which date there had been considerable correspondence as to his claim. On the 31st of March he issued a writ, also sending in an account of his wages, which were paid after this date.

Barnes, for the plaintiff. There was no complete demise of the ship under the charterparty. The master was acting in a double capacity. Specially he was the agent of the charterer, generally he was the agent of the owner in respect of disbursements chargeable against the ship: *The Beeswing.* (1)

Ten days' double pay is clearly due, for from the course of proceedings before the writ the owner must have been aware that a sum was due to him.

Bigham, Q.C., and *Aspinall*, for the defendants. The defendants are not liable; the plaintiff was the servant of the charterer, so much so that even with regard to the provisions for which the owners were liable, the charterer should have paid in the first place, and then have settled with the owners, and the master should not have pledged the owner's credit at all.

For the coals the master had absolutely no authority to draw on the owners.

(1) 53 L. T. (N.S.) 554.

As to the claim for double pay, it was unreasonable to issue a writ on the same day that a final account was sent in, and so the defendants are not liable.

Cur. adv. vult.

Jan. 19. THE PRESIDENT. This is an action by the captain against the owners of the *Turgot*, for necessaries supplied at Palermo, for which the captain has made himself liable, and in respect of which judgment has been recovered against him. He also claims for necessaries at Malta, and for wages. The defendants deny their liability on the ground that the plaintiff in incurring these liabilities acted as agent for the charterer and not for the owners. As to the wages, they say they have been paid. By the charterparty the owners were to provide and pay for provisions and wages, the charterer to provide and pay for coals and other expenses. The captain was to be appointed by and to follow the instructions of the charterer, and if the owners were dissatisfied with the captain, the charterer was to investigate the fact, and if necessary make a change. The captain was in fact appointed by the charterer, and was furnished with a copy of the charter-party. The captain was therefore the agent of the owners in providing these necessaries, which by the terms of the charter were to be paid for by the owners, and was the agent of the charterer in providing necessaries for which they were to be responsible. At Malta the captain ordered coals to the amount of 150*l.* 10*s.* 0*d.*, provisions to the value of 18*l.* 13*s.* 2*d.*, and obtained an advance of 6*l.* to himself. After the coals and provisions were supplied, the captain proposed to pay for them by drawing on the charterer, but the merchant who supplied them refused to be paid in this way, alleging that he had instructions from the owners that the captain was to draw on them. Believing this statement, which was incorrect in fact, the captain did draw on the owners for the coals and provisions, and it is in respect of his liability on this bill that he now claims against the owners. But I am of opinion that the captain is not entitled to recover in respect of the coals, as by the terms of the charterparty he had no authority to pledge the owners' credit in respect of them. It was argued that the master had an implied authority to pledge the owners' credit as

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their agent ex necessitate in order to enable the ship to sail; and I was referred to *The Beeswing* (1) as an authority for this contention. But the authority of the master depends on the facts, and as the charterers were bound to pay for the hire of the vessel during its detention, the owners had no interest in obtaining its immediate departure. Even if it had not been so, the plaintiff should have communicated by telegram with his owners before pledging their credit for disbursements which he knew they were not bound to make. On the other hand I think that the captain had implied authority on the owners' behalf to make disbursements for provisions which they were bound by the charterparty to supply, for in regard to them he was in the ordinary position of a master in respect of his owners. On the same principle he was entitled to pledge the owners' credit for provisions at Palermo, and he can therefore recover in respect of these necessaries supplied there.

With regard to the costs incurred by the plaintiff in defending the actions brought against him, he cannot recover them. He was clearly liable in those actions, and should not have defended them except at the request of the present defendants.

I hold that the plaintiff is not entitled to recover ten days' double pay, as the small balance of wages due was not delayed "without sufficient cause." It was only found to be due on a final settlement of involved accounts, and was in fact paid within a few days of the commencement of the action. The plaintiff is on the whole therefore entitled to recover the sum of 48*l.* 17*s.* 6*d.* I think that this case was one proper to be investigated in this Court, and I therefore give judgment with costs.

Solicitors for plaintiff: *Lowless & Co.*
Solicitors for defendants: *Lyne & Holman.*

(1) 53 L. T. (N.S.) 554.

E. S. R.

[IN THE COURT OF APPEAL.]

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Collision—Sailing Rules—Fog—Moderate Speed—Regulations for Preventing Collisions at Sea, Arts. 13, 18.

The plaintiffs' steamer, in a fog off Cromer, heard a whistle almost right ahead; she was then going slowly, about three knots an hour, and she continued at this speed for about a minute, until a second whistle was heard, when the order was given to stop and reverse; but the defendants' steamer coming into sight, a collision occurred. The defendants admitted at the trial that they were to blame:—

Held, by the Court of Appeal, affirming the Admiralty Division, that the plaintiffs were also to blame, for they had infringed art. 18 by going on at the same speed after they heard the first whistle as before.

By Lord Esher, M.R. If an officer in charge of a vessel in a fog hears a whistle ahead, he must act sooner than if it is heard from any other quarter, and on the probability that the vessel which is sounding the whistle is coming towards him. The officer in charge of the plaintiffs' steamer on hearing the first whistle should have reduced her speed to as slow a rate as possible, only keeping her under command; by omitting to do so he had not gone at a "moderate" speed within the meaning of art. 13, and had also infringed art. 18.

The Dordogne (10 P. D. 6) commented on.

APPEAL from a judgment of the President in an action for damages by collision, whereby he held the plaintiffs' steamer, the *Telesilla*, to be partly to blame for the collision, the defendants, the owners of the steamer *Ebor*, having admitted by their pleadings that in any event the *Ebor* was to blame.

The facts, as proved at the trial and as found by the learned judge, so far as the *Telesilla* was concerned, were, that the collision took place about 4.25 A.M. on the 9th of January, 1885, off Cromer, in a thick fog. The officer in charge of the *Telesilla* heard a whistle "practically ahead, very slightly on the port bow;" the *Telesilla* continued going at the same speed, viz., about three knots over the ground, her engines going slow. Within about a minute the whistle was again heard louder and nearer, a very little on the port bow, and immediately after the *Ebor* came in sight on the port bow about two ships' lengths away, and struck the stem of the *Telesilla*. It was uncertain from the evidence whether a third whistle was not heard from the *Ebor*. When the

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second whistle was heard the order was given to stop, and immediately after to reverse, the two orders being in fact almost simultaneous. The third whistle, if there was one, was practically simultaneous with the second.

The President found the *Telesilla* partly to blame, because, as stated in his judgment, "where a whistle of a steamer is heard (for convenience I say practically ahead), it is not right to wait till another whistle is heard, but immediate steps must be taken to ascertain in what direction the other may be going," and because "those on board the *Telesilla* ought to have stopped when they heard the first whistle, until they had time to discover by the sound of the whistle whether the vessel was approaching or what it was doing."

The plaintiffs appealed.

Sir W. Phillimore (*Aspinall* with him), for the plaintiffs. When one vessel going at a moderate speed, hears a whistle ahead in a fog, as those on the *Telesilla* did, it is impossible to know that the vessels are approaching so as to involve risk of collision. Therefore the *Telesilla* did not infringe art. 18 (1) by going on until another whistle was heard. The speed at which the *Telesilla* was going when the first whistle was heard was clearly a moderate speed within the meaning of art. 13 (2), and therefore the *Telesilla* did not infringe that rule. Consequently, not having infringed either article, the learned President ought not to have held the *Telesilla* to be to blame. He referred to the *Dordogne*. (3)

Hall, Q.C., and *Baden-Powell*, for the defendants, were not called on.

LORD ESHER, M.R. We agree with the judgment and the reasons of the learned President. During the hearing of this case much has been said in regard to the case of the *Dordogne* (3), and the construction of art. 13. In that case the construction

(1) Art. 18. Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary.

(2) Art. 13. Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow, go at a moderate speed.

(3) 10 P. D. 6.

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of that article was discussed, and the question arose whether "moderate" was to be considered an absolute term, or relative according to the circumstances. It was there held that "moderate" did not mean moderate speed absolutely, but that moderate speed meant moderate according to circumstances, so that what is moderate speed at one time is not moderate at another. We did not attempt to lay down any specific distance in any case, or say that if two vessels were within a mile of each other, or a mile and a half, the article was to be interpreted according to that fact. I illustrated that rule by the example of a vessel going up or down a narrow river, where she would know she would be likely to meet a vessel right ahead, and when, whether she heard a whistle or not, she would know she ought to have only just enough way on her to keep her steerage way. I also mentioned the case of a vessel on the open sea, but in the track of ships, in a fog, when she should go very slowly, though not so slowly as if she were in a narrow river.

If, however, a vessel is on the open sea in a fog, and not on any particular track of ships, until she hears something she has no reason to suppose that any ship is near her. But when she hears a whistle the circumstances are different. If she hears it astern, there is no reason why she should stop. If the whistle comes from a vessel on either beam, there is also no reason for her to stop. But a whistle on either bow is quite a different matter, and it is absurd to say that the distance at which it is off cannot to some extent be told. Supposing, then, that the whistle is heard broad on the bow about two miles distant, there is no occasion to stop the ship, perhaps hardly any to moderate her speed. If the sound of a ship is on either bow, then the ship hearing that sound ought to be brought to a moderate speed, though the sound be apparently distant. But if the whistle is ahead it then becomes necessary to take extreme precautions, for every half minute is bringing the two vessels closer together, and is causing a probability of danger. When the whistle sounds ahead, the person in charge of the vessel which hears it should act sooner than if the whistle is heard from any other quarter. But supposing it is ahead, or on either bow, then the question is whether the officer has a right to wait till he hears a second whistle. It seems to me that

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if it is ahead he ought not to wait at all. If it is on either bow, and apparently at a considerable distance, he may possibly, though I doubt it, wait till he hears the second whistle. If the second whistle is nearer, the position is clear: he should stop, and keep his vessel in hand, so that he can do anything in a moment.

In the present case there seems some dispute, whether there were three whistles or two; one witness, however, says that there was one whistle, and then two within a second of each other, and that within a second after these two were sounded, the *Ebor* came in sight. But two whistles so close together are equivalent to one. If, however, there really was an interval between the second and third, the question is, whether the *Telesilla* was manœuvred properly at such second whistle, and if the person in charge acted properly on hearing the first. In substance we must take it that there were two whistles. Then what should the *Telesilla* have done, when the first whistle was heard, which was as nearly as possible ahead? It has been called a "dull" whistle, but this must depend on the distance which the two vessels were apart. If they were near each other, then it could not properly be called a dull whistle. It seems in fact to have been what may be called an ordinary whistle, for the ships were not more than a mile apart and were end on. Then it was the duty of the officer in charge of the *Telesilla* to go at a speed which, under such circumstances, was moderate. He was going at the time at a speed of from three to three and a half knots over the ground, he was in fact going with the engines easy, which was under those circumstances a moderate speed, before the whistle was heard. But it was not moderate afterwards, for moderate speed then was to go as slowly as he could, only keeping his vessel well under command. He was not then bound to stop. But instead of slowing his engines he went on at the same speed, so the question comes to this, whether the *Telesilla* was going at a moderate speed, within the meaning of the rule, between the first and second whistles. From the first whistle the officer in charge could not tell if the other ship was coming towards him or not. Under such circumstances, viz., a whistle right ahead in a fog, so that a ship cannot be seen at a distance—a man ought to act on the possibility, nay the probability, that the other vessel is coming towards him. That rule

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I unhesitatingly lay down. It follows, then, that the speed should be as slow as it can be. If it is not, art. 13 is broken, and if a vessel has broken that rule, the consequence is that if a steamship she has also broken art. 18. It is possible to break art. 18 without breaking art. 13, because the latter only applies to a fog, but by breaking art. 13, art. 18 is also broken. If, supposing the *Telesilla* had slowed, as I have said she ought to have done on hearing the first whistle, and the second whistle had shewn that the other vessel was going away from her, she might have then gone on at her former speed. But if the second whistle shewed that the other vessel was approaching, then the person in charge of the *Telesilla* would have had to act again, because though her engines had been brought to slow, they would have to be stopped and probably also reversed. The *Telesilla* should have been going at such a speed that when the second whistle was sounded the engines could have been stopped and reversed, and the vessel have got sternway almost immediately. Unfortunately the officer in charge of the *Telesilla* did not take this view, and his ship has properly been pronounced to blame. The Regulations—as we have repeatedly pointed out—are not made only to prevent collisions, but to prevent the danger of collision; they must therefore be construed strictly. That is the view of the learned President; he has bound this vessel by the strict rule, and I am of opinion that he was right in so doing. I should like to express myself so clearly, that the most hypercritical should not question what I now say, that this was the case of a vessel nearly right ahead at such a distance that the whistle shewed that, if she were approaching, a position of great danger must be soon produced, that therefore the officer in charge should have acted on the probability of that ship approaching—even though in fact she was not doing so—that therefore he ought to have acted without delay, and that because he did not act at once he broke arts. 13 and 18, with the consequence that his vessel must be held to blame.

LINDLEY, L.J. I am also of opinion that the conclusion arrived at by the President in this case was right. The collision took place in a fog off Cromer, and up to that time the *Telesilla* was going at what there is no reason to suppose was other than a

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moderate speed. She was going easy, and I understand there was no other method of going slowly, except, perhaps, by stopping the engines from time to time and thus going slower. I will assume this to be so. It is said there was no mark for dead slow in the engine-room. Be it so. The *Telesilla* hears a whistle, which is a little on the port bow, but practically ahead. Now comes the question. What ought she to have done? In point of fact, we know she did nothing until she heard the second whistle, which was plainer and clearer, and which shewed that the vessel was approaching; and directly after that the *Ebor* was seen, and there was a collision. The real question is reduced to this: What ought to have been done when the first whistle was heard? It is clear that nothing was done. I agree with the learned President when he says: "This state of facts, which they put forward, shews that immediate steps must be taken to ascertain in what direction the other may be going. As I have myself had occasion to say they must, as it were, put themselves en rapport with each other. If the vessels continue going on as they are, until another whistle is heard—it may be through the negligence of the other vessel—the vessels are brought into such proximity that it may be impossible to avoid a collision." It is impossible to say what ought to be done without knowing the circumstances of the case, and it is difficult to lay down a general rule. But, looking at the facts of this case and at the speed at which this vessel was going—moderate speed up to that moment—it is obvious that something might have been done to find out where the *Telesilla* was with regard to the other vessel. It seems to me that she was in fault, and did break art. 18, as has been found by the learned judge. I am of opinion that the decision is right, and that the appeal must be dismissed.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Botterell & Roche.*

Solicitors for defendant: *Ingledew, Ince, & Colt.*

E. S. R.

THE BERNINA.

1886
March 2.

Collision—Damages for Loss of Life—Improper Navigation—Both Ships to blame —Lord Campbell's Act (9 & 10 *Vict. c.* 93), *s.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.

A collision having occurred through the fault of both vessels, three persons on board one of them, an engineer and a passenger who had nothing to do with the navigation, and an officer who was responsible for it, were drowned:—

Held, following *Thorogood* v. *Bryan* (8 C. B. 115), that an action in personam could not be maintained by the representatives of the deceased persons against the owners of the other vessel, and that the Judicature Act, 1873, s. 25, sub-s. 9, did not apply.

Special Case, stated for the opinion of the Court in three actions brought in personam against the owners of the steamer *Bernina*. The first action was brought by the personal representative of J. H. Armstrong, an engineer on board the steamer *Bushire*, which, on the 28th of September, 1884, came into collision with the *Bernina*. Through this collision Armstrong was drowned. It was admitted that the collision was caused by the default of the master and crew of both vessels, but it appeared that Armstrong had nothing to do with the negligent navigation of the *Bushire*.

The second action was brought by the personal representative of T. T. Owen, the second officer on the *Bushire*, who was in charge of her at the time of the collision, was directly responsible for the negligent navigation which was partly the cause of this collision, and who was drowned.

The third action was brought by the personal representative of M. A. Toeg, a passenger on the *Bushire* at the time of the collision, who had nothing to do with the navigation of the *Bushire*, and was drowned.

The questions for the opinion of the Court were whether the defendants were liable for any damages in any of the three actions, and if they were, whether for the whole or for a moiety only of the damages in each case.

Bucknill, Q.C., and *Nelson*, for the plaintiffs in each action. The defendants are liable in these actions for the whole of the damages, or for a moiety of the damages in the case of the

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second officer, if not for the whole in that case. An action under Lord Campbell's Act (9 & 10 Vict. c. 93), s. 1, is a proceeding for damages arising out of a collision between two ships within the Judicature Act, 1873, s. 25, sub-s. 9 (1), and therefore, as by the Admiralty rule half damages, when both ships were in fault, could be recovered from the owners of each vessel, the plaintiffs are at the least entitled to half damages: *The Milan* (2); *The Sylph* (3); *The Beta.* (4)

If the common law rule applies the plaintiffs are not bound by the case of *Thorogood* v. *Bryan.* (5) The facts of the present cases differ from those in *Thorogood* v. *Bryan* (5), there is no such selection of the carrier by the passenger as in that case, and with regard to the engineer and officer, they must take such employment as is offered them. *Thorogood* v. *Bryan* (5) was followed in *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (6), but the doctrine there laid down has been dissented from by text-writers of authority (7), by Dr. Lushington in *The Milan* (2); and by Scotch and American judges, and is not binding on this Court, if it is clearly of opinion that it was a wrong decision: *Adams* v. *Glasgow and South Western Ry Co.* (8); *Chapman* v. *New Haven Ry. Co.* (9)

Sir W. Phillimore, and *Barnes*, for the defendants. The defendants are not liable for any damages. *Thorogood* v. *Bryan* (5) is a decisive authority in their favour. That case has been approved in the House of Lords: *Spaight* v. *Tedcastle* (10); and the principle was also acted on in *Waite* v. *North Eastern Ry. Co.* (11)

The intention of the Judicature Act, 1873, s. 25, sub-s. 9, was to prevent a difference in the measure of damages in actions for damage to ships and cargoes. It was not intended to apply to personal actions. Before the Judicature Act, 1873, it is clear

(1) 36 & 37 Vict. c. 66, s. 25, sub-s. 9: "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail."

(2) Lush. 388.

(3) Law Rep. 2 Ad. & E. 24.

(4) Law Rep. 2 P. C. 447.

(5) 8 C. B. 115.

(6) Law Rep. 10 Ex. 47.

(7) Addison on Torts, 4th ed. 388.

(8) Cases in the Court of Session, 4th Series, vol. iii. 215.

(9) 19 New York Rep. 341.

(10) 6 App. Cas. 217.

(11) E. B. & E. 728; 28 L. J. (Q.B.) 258.

that an action could not properly have been bought for half damages under Lord Campbell's Act in the Admiralty Court, where there was contributory negligence: *The Vera Cruz.* (1)

Bucknill, Q.C., in reply.

BUTT, J. The English decisions on the point which has just been argued are quite clear. Perhaps if I had for the first time to decide the question discussed in *Thorogood* v *Bryan* (2) I should have hesitated before I arrived at the conclusion which was come to in that case, especially having regard to opinions which have been expressed by text-writers, and by judges in Scotland and America. But, as Lord Blackburn said in *Spaight* v. *Tedcastle* (3), *Thorogood* v. *Bryan* (2) has never been overruled in this country. Having regard to the universal practice by which a judge declines to overrule the decision of a Court of co-ordinate jurisdiction, I cannot ignore that case. I must therefore decide that in each of the three actions the doctrine laid down in *Thorogood* v. *Bryan* (2) bars the plaintiff from recovering, unless the Judicature Act, 1873, s. 25, sub-s. 9, enables the Court to award half damages to the plaintiff. It is said, and with some reason, that in these cases there is a cause arising out of a collision between two ships, and, therefore, that this sub-section applies. If these were the only words in the sub-section this would be sound, but taking the whole together, this case is not, I think, within it. The legislature did not contemplate such a case as this, it only contemplated cases where the rules of the Admiralty Court were at variance with those of the common law. Actions under Lord Campbell's Act are essentially different from those that were tried by the Admiralty Court, and therefore there was no rule applicable to the former class of cases. If there was no Admiralty rule, then there was not one at variance with the rules of the common law, and there being no variance this sub-section could not apply. On these grounds, though I regret it, I am constrained to hold that the plaintiffs cannot recover in these actions.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Pritchard & Son.*

(1) 10 App. Cas. 59. (2) 8 C. B. 115. (3) 6 App. Cas. 217.

E. S. R.

1886
Feb. 24.

THE OAKFIELD.

Collision—Improper Navigation—Compulsory Pilotage—Responsibility of Pilot for getting under Way—Suggestions by Master.

Where a vessel is in charge of a pilot by compulsion of law, there is no duty on the master to prevent her from being got under way in obedience to an order of the pilot, unless such a proceeding is manifestly dangerous.

The defendants' vessel was compulsorily in charge of a duly licensed pilot, and was got under way when the weather was thick and hazy, but vessels could be seen at 300 yards distance:—

Held, that the defendants were not responsible for damage caused by the vessel being under way.

While the defendants' vessel was approaching that of the plaintiffs, the master expressed his opinion that her helm should be starboarded. The pilot gave the order, and in consequence of it a collision occurred.

Held, that the defendants were not responsible for the damage caused by the collision.

The Loch Libo (3 W. Rob. 310) approved.

ACTION OF DAMAGE.

The collision occurred about 2·30 P.M. on the 27th of January, 1886, between the plaintiffs' steamship *Duchess of Albany* and the defendants' steamship *Oakfield*, in the River Mersey. The *Duchess of Albany* at the time of the collision was at anchor, and the weather was thick and hazy, the tide was flood, running at about two knots an hour. The *Oakfield* was inward bound on a voyage from Tripoli to Birkenhead Docks. She had been at anchor in the Crosby Channel, and was under the charge of a duly licensed pilot by compulsion of law, and was proceeding slowly up the river. The *Duchess of Albany* was seen from the *Oakfield* when about 300 yards distant, a little on the starboard bow. The helm of the *Oakfield* was starboarded, and then put hard a-starboard, and the engines were put full speed ahead, so as to enable her to pass ahead of the *Duchess of Albany*, but she did not do so, and struck the stem of the *Duchess of Albany* with her starboard side.

From the evidence, it was doubtful whether the *Duchess of Albany* was reported to the pilot before he and the captain saw her. They were then uncertain whether she was under way, and according to the evidence of the pilot, he ordered the helm of the

Oakfield hard aport, in order to go ahead of the *Duchess of Albany*, but on the captain saying that the helm should be starboarded, he gave this order "to carry out the captain's order."

Hall, Q.C., and *Carver*, for the plaintiffs. The defendants are liable: this collision was not occasioned solely by the fault of the pilot. There was a bad look-out. The order to starboard was that of the master, and the pilot merely carried out his order, and therefore it was the fault of the master and not of the pilot. The *Oakfield* should not have left her anchorage in bad weather; the master alone is to blame for allowing her to do so: *The Borussia* (1); *The Girolamo.* (2)

Sir W. Phillimore, and *Pickford*, for the defendants. The pilot alone occasioned this collision, the plaintiffs have not brought themselves within the *Clyde Navigation Co.* v. *Barclay.* (3) If the *Oakfield* was improperly under way that is the fault of the pilot: *The Loch Libo* (4); *The Peerless* (5); *The City of Cambridge.* (6) The pilot adopted the suggestion of the master and made it his own order, and is accordingly liable for the consequences of it: *The Loch Libo.* (4) The look-out was good.

Hall, Q.C., in reply.

THE PRESIDENT. That this collision occurred from the default of some one on the *Oakfield* is unquestionable. Was it the fault of the pilot or of the master and crew? The first question is, whether anything in the state of the weather made it an act of negligence for the *Oakfield* to be under way. I told the counsel for the defendants, that I was under the impression that in foggy weather it might be wrong on the part of the captain to allow his vessel to get under way. I am still disposed to think that there might be such a fog as to make it a fault on his part to allow his vessel to be moved; if there were a clear and plain prospect of danger the master could not throw the whole blame on the pilot if he ordered the vessel to get under way. But on this occasion, though the weather was foggy and hazy, it is admitted that vessels could be seen for a considerable distance, at least for

(1) Sw. 94.
(2) 3 Hagg. 169.
(3) 1 App. Cas. 790.
(4) 3 Wm. Rob. 310.
(5) Lush. 30.
(6) Law Rep. 5 P. C. at p. 460.

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300 yards. If they could be seen at such a distance it would be for the pilot to decide if the *Oakfield* should weigh anchor, and the master would leave it to his responsibility. Therefore the weather was not such as to make it a breach of duty on the part of the captain to allow his vessel to proceed from her anchorage. But I am advised, that having regard to the flood-tide and state of the weather, it was imprudent to have the *Oakfield* under way. This was entirely a matter for the pilot to decide. [The learned President then discussed the evidence as to the look-out and found that it was a good one.]

Next, we are of opinion that it was wrong for the *Oakfield* to attempt to pass across the bows of the *Duchess of Albany*, and the question is whether the pilot or the master is wholly or partly to blame. It seems clear that there was some doubt in the minds of both as to whether the *Duchess of Albany* was under way or not. But the pilot says he gave an order to port, and he goes so far as to say that he thinks the helmsman had begun to make the alteration; on this point, however, his evidence has been contradicted, and I think he did not give this order. Up to the time of the order to starboard, the pilot had been giving the orders. He admits that this particular one proceeded from his lips, but he says he was merely carrying out the captain's order. I cannot accept his explanation. The truth is that when the *Duchess of Albany* was first seen there was a doubt as to whether she was or was not at anchor, and the captain very likely did strongly express the opinion that it would be safe and proper to starboard and go across her bows. It is plain that the pilot adopted his view, carried it out, and thus brought about the collision.

Thus the question remains whether the part played by the captain was such an interference with the pilot as to take away his responsibility. It was pointed out by Dr. Lushington in *The Loch Libo* (1), that a suggestion made to the pilot does not take away the responsibility from him. It rests with the pilot to form an opinion in regard to the captain's suggestion, and it is only when the captain gives an order contrary to that of the pilot that he takes the responsibility for the manœuvre on himself and removes it from the pilot. That this relation between captain

(1) 3 Wm. Rob. 310.

and pilot was understood by these two men is clear, for otherwise the pilot would have left it to the captain to give the order. Therefore the entire responsibility in this case rests with the pilot. The defendants are accordingly entitled to judgment on the ground of compulsory pilotage, and, as this was the only question raised, with costs.

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Solicitors for plaintiffs: *Simpson & North, Liverpool.*
Solicitors for defendants: *Bateson & Co., Liverpool.*

E. S. R.

THE IDA.

Feb. 16.

Shipping Casualty—Board of Trade Inquiry—Re-hearing—Shipping Casualties Investigation Act, 1879 (42 & 43 *Vict. c.* 72), *s.* 2, *sub-ss.* 1, 2.

A refusal by the Board of Trade to grant a re-hearing of an investigation into the conduct of a certificated officer, is not a decision within 42 & 43 Vict. c. 72, s. 2, sub-s. 2, and therefore no appeal lies from it to the Admiralty Division of the High Court.

APPEAL by the master of the steamer *Ida* from the refusal of the Board of Trade to grant an application to order a re-hearing of an investigation into a casualty to the *Ida*. The investigation resulted in a finding that the casualty was caused by negligent navigation, that the master was in default, and that his certificate should be suspended for six months. What was considered by the advisers of the master to be new and important evidence which could not be produced at the investigation was discovered, and the master then applied to the Board of Trade for a re-hearing. With his application he enclosed a summary of the evidence so discovered. The Board of Trade refused to accede to this application, but gave no reason for such refusal.

Myburgh, Q.C., for the master. It is contended that by 42 & 43 Vict. c. 72, s. 2 (1) there is an appeal to this Court from the

(1) 42 & 43 Vict. c. 72, s. 2 (1):—"Where an investigation into the conduct of a master, mate, or engineer, or into a shipping casualty, has been held under the Merchant Shipping Act, 1854, or any Act amending the same, or under any provision for holding such investigation in a British possession, the Board of Trade may, in any case, and shall, if new and

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refusal of the Board of Trade to order a re-hearing. The legislature would not have permitted an appeal against the decision of the tribunal which investigated a casualty, and not against a decision of the Board of Trade refusing to grant a re-hearing. Such refusal is a decision within the meaning of 42 & 43 Vict. c. 72, s. 2, sub-s. 2.

Danckwerts, for the Board of Trade. There is no appeal. The question has been decided by *The Golden Sea*. (1) Secondly, the decision to be appealed against must be one given at the investigation.

[He was then stopped.]

THE PRESIDENT. This, I think, is a clear case. By 42 & 43 Vict. c. 72, s. 2, the Board of Trade "may" in any case—so far, the matter is left to their discretion—and "shall" if new and important evidence be discovered, order a re-hearing. These words impose on the Board of Trade a duty, when new and important evidence which could not be produced at the investigation is discovered, to grant a re-hearing, and they may be compelled by mandamus to grant it. Here, however, we have only to deal with the question of an appeal against a refusal to order a re-hearing. It is clear that sub-s. 2 of the same section refers to the previous sub-section, to an investigation in regard to the cancelling of the certificate of the master, mate, or engineer. That is to say it refers to a decision in that investigation, and not

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important evidence which could not be produced at the investigation has been discovered, or if for any other reason there has in their opinion been ground for suspecting a miscarriage of justice, order that the case be re-heard, either generally or as to any part thereof, and either by the Court or authority by whom it was heard in the first instance, or by the wreck commissioner, or in England or Ireland, by a judge of Her Majesty's High Court of Justice exercising jurisdiction in Admiralty cases .... and the case shall be so re-heard accordingly.

(2.) Where in any such investigation a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for a re-hearing under the section has not been made or has been refused, an appeal shall lie from the decision to the following Courts, namely:

(*a.*) If the decision is given in England or by a naval court, the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice."

(1) 7 P. D. 194.

to a decision of the Board of Trade not to grant a re-hearing. But the subsequent part of the section makes that clearer, for it says: "If an application for a re-hearing under this section has not been made or has been refused, an appeal shall lie from the decision." Thus it carefully distinguishes the decision in the investigation from that which the Board of Trade alone has to deal with, viz., the exercise of their discretion, or their duty to grant a re-hearing. Mention has been made of some rules as to the time in which a party appealing shall serve notice on the parties concerned, but we have now only to decide whether the decision of the Board of Trade as to a re-hearing can be appealed against. Without entering into any question whether or not it is inconvenient that the decision of the Board of Trade should be incapable of being reviewed by this Court, I am clearly of opinion that there is no appeal under the statute, and therefore that the present application fails and must be dismissed with costs.

BUTT, J. I am of the same opinion. It is quite clear that the word "decision," to which reference has been made, refers to the decision of the Court by which the investigation has been held, and not to any reply which the Board of Trade may make to an application founded on the provision of sub-s. 1. Therefore the Court—without entering into any question as to the merits of the case—is bound to dismiss this appeal.

Solicitors for the master: *Botterell & Roche.*
Solicitor for the Board of Trade: *Murton.*

E. S. R.

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Feb. 9

[IN THE COURT OF APPEAL.]

THE ARDANDHU.

Limitation of Liability—Claim against Fund in Court—Discontinuance.

The plaintiffs having brought an action against the defendants for damage by collision, an agreement was signed by the parties as follows: "We hereby consent to this action being discontinued without costs on the ground of inevitable accident," and an order was accordingly made in the Registry for the discontinuance of the action. An action was afterwards brought by the owners of cargo on the plaintiffs' vessel against the defendants in respect of the same collision, and both ships were found to blame. The defendants obtained the usual decree limiting their liability, and paid a sum in respect of such liability into court. The plaintiffs then obtained with the defendant's consent an order from Butt, J., setting aside the order of discontinuance, and claimed in the limitation action against the fund in court:—

Held, by the Court of Appeal, affirming the Admiralty Division, that their claim was valid, for the agreement and order operated as a discontinuance and not as a release of the first action.

The Bellcairn (10 P. D. 161) distinguished.

Motion in objection to the Registrar's report. The facts out of which the motion arose were as follows: On the 1st of March, 1883, a collision occurred between the *Kron Prinz* and the *Ardandhu*, and an action in the Admiralty Division was brought by the owners of the *Kron Prinz* against the *Ardandhu*. On the 1st of May, 1883, an agreement signed by the solicitors for the owners of the respective ships was made as follows: "We, Lowless & Co., for the defendants, hereby consent to this action being discontinued, without costs, on the ground of inevitable accident." This agreement being taken to the Admiralty registry, on the 2nd of May an order was made discontinuing the action in the following terms: "Upon consent of both solicitors it is ordered that this action be discontinued without costs on the ground of inevitable accident."

On the 25th of June, 1883, an action for damages arising from the same collision was brought by the owners of the cargo on the *Kron Prinz* against the *Ardandhu*. On the 18th of December, 1884, this action was tried and both vessels were found to blame, the plaintiffs being pronounced to be entitled to recover one-half the damages from the owners of the *Ardandhu*. On the 29th of

January, 1885, the owners of the *Ardandhu* commenced an action to limit their liability, and on the 24th of March the usual decree was made, and a sum was paid into court.

On the 30th of June, 1885, the consent order of the 2nd of May, 1883, was, on the application of the owners of the *Kron Prinz*, rescinded by Mr. Justice Butt, the owners of the *Ardandhu* consenting. Subsequently among the claims filed against the fund in court was one by the owners of the *Kron Prinz*. This claim at the reference before the registrar and merchants was contested by the owners of the cargo on the *Kron Prinz*, but was allowed by the registrar for the reasons stated in his report, which, so far as material, was as follows: "This claim has been contested on the ground that the owners of the *Kron Prinz* have debarred themselves from recovering against the *Ardandhu* by having discontinued their original action and consented to the terms of the consent order made therein on the 2nd of May, 1883, as before stated. It is contended that this case comes within the principle of the decision of this Court, confirmed on appeal in the recent case of *The Bellcairn* (1); I am of opinion, however, that there is an essential difference between the two cases. In the case of *The Bellcairn* (1) an action by the owners of the *Britannia* against the owners of the *Bellcairn* had, after trial in Court, been dismissed, and when subsequently the owners of the *Britannia* claimed to prove for their damages against the fund paid into court in the action brought by the owners of the *Bellcairn* to limit their liability, the Court held that such claim had been properly disallowed by the registrar at the reference, and that the owners of the *Britannia* were not entitled to share in that fund. In this case, on the contrary, the original action on behalf of the owners of the *Kron Prinz* was not dismissed, but was simply discontinued before the delivery of any statement of defence, and I am unable to see that the plaintiffs' right to commence another action for the same cause, which would otherwise be unquestionable, can be affected by the introduction into the before-mentioned order of Court of the words 'by reason of inevitable accident.' Those words may have been introduced as a quasi reason for the defendants consenting to waive costs. It appears to me that the objection raised by the owners of cargo to

(1) 10 P. D. 161.

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the participation of the owners of the *Kron Prinz* in the fund in court is not well founded, and I have accordingly allowed the claim of the latter."

It was against this decision that the owners of cargo on the *Kron Prinz* by their motion in effect appealed.

Sir W. Phillimore, and *Stubbs,* for the owners of the cargo on the *Kron Prinz.* This was an agreement filed under Order LII., r. 23 (1), and so equivalent to an order of the judge himself. In *The Bellcairn* (2) it was held that a judgment cannot be set aside to the prejudice of third parties. This order has the same effect as a judgment—it puts an end to the action. The principle of *The Bellcairn* (2) must therefore govern the present case, and the owners of the *Kron Prinz* have no claim on the fund.

Barnes, for the owners of the *Kron Prinz.* This was not a judgment of the Court, as in *The Bellcairn* (2); it was simply a consent order, the agreement never being formally filed, and it did no more than purport to discontinue the action by consent of the parties under Order XXVI., rule 1 (3), and equally by consent of

(1) Order LII., r. 23. "Any agreement in writing between the solicitors in Admiralty actions, dated and signed by the solicitors of both parties, may, if the Admiralty registrar think it reasonable and such as the judge would under the circumstances allow, be filed, and shall thereupon become an order of the Court, and have the same effect as if such order had been made by the judge in person."

(2) 10 P. D. 161.

(3) Order XXVI., r. 1. "The plaintiff may, at any time before receipt of the defendant's defence or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application) by notice in writing, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a judge, but the Court or a judge may before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order the action to be discontinued, or any part of the alleged complaint to be struck out. The Court or a judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave."

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the parties it can be revived. It has been revived in a proper manner by obtaining an order of the Court setting aside the consent order. *The Bellcairn* (1) cannot therefore apply to this case, in which there has been no regular judgment of the Court.

Sir W. Phillimore, in reply. This was not a mere discontinuance of the action, it was a termination of it by agreement between the parties.

Nelson, for the owners of the *Ardandhu*, did not argue.

Cur. adv. vult.

Feb. 16. THE PRESIDENT. This was an action for limitation of liability, brought by the owners of the vessel *Ardandhu*, and the usual decree has been made and a fund has been paid into court. Against this fund the owners of the *Kron Prinz*, the vessel with which the *Ardandhu* came into collision, seek to prove their claim. It has been contended on behalf of the owners of cargo in the *Kron Prinz* that the owners of the ship are not entitled to any share in the fund, because they discontinued an action which they commenced against the *Ardandhu*.

It is, however, clear, that the mere discontinuance of an action does not preclude a plaintiff from substantiating his claim in other proceedings, or by proof in bankruptcy, or, as in this case, by proof against the fund in court. But it has been contended in this case that the particular terms of the order to discontinue bar the right of the owners of the *Kron Prinz* to prove; this order was subsequently rescinded by Mr. Justice Butt. It has been argued on behalf of the owners of cargo on the *Kron Prinz*, that this case is governed by that of *The Bellcairn*. (1) I am, however, of opinion, that there is a material distinction between that case and the present. In *The Bellcairn* (1) there was a decree of the Court in operation, which could only be set aside by the Court, and not by consent of the parties. The judgment of the Court of Appeal proceeded on the ground that the matter was res judicata. Here there was no decree negativing the plaintiffs' claim, but only a discontinuance of the then existing proceedings. The owners of the *Kron Prinz* were entitled to discontinue their action as a matter of course on payment of costs,

(1) 10 P. D. 161.

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they only required the consent of the owners of the *Ardandhu* to avoid the payment of costs. This consent the latter gave, and added their reason for so doing, that they considered that the collision arose from inevitable accident. Mr. Justice Butt rescinded this order, and it is now not in existence, and cannot affect the case, whatever effect it might have had whilst in force.

But it was further argued, that apart from the order to discontinue there was a pre-existing agreement between the parties, which being filed had the effect of barring the claim of the owners of the *Kron Prinz*. I am of opinion, however, that that was not such an agreement as is contemplated by Order LII., rule 23. It was not treated in the registry as such an agreement, but simply as a consent to draw up the order. I therefore uphold the registrar's report.

The owners of the cargo on the *Kron Prinz* appealed.

March 17. The appeal was heard.

Sir W. Phillimore, and *Stubbs*, for the appellants.

Barnes, for the respondents.

Cur. adv. vult.

March 18. LINDLEY, L.J. (The Lord Justice after stating the facts proceeded :—) The question is, are the owners of the *Kron Prinz* entitled to rank against the fund in court? The registrar of the Admiralty Court has allowed them to do so, and the President has confirmed his decision. The question turns on the true construction of the agreement of the 1st of May, 1883. After the decision in *The Bellcairn* (1) there can be no doubt that if this agreement amounts to a release of all demands by the owners of the *Kron Prinz* against the owners of the *Ardandhu*, the former cannot claim against the fund in court. For it is well settled that when the fund is paid into court, only existing claims can rank against it, and whether the claim be revived or created for the first time is immaterial. If the owners of the *Kron Prinz* had actually given up their claim, by no method could it have been revived. But that leaves untouched the true

(1) 10 P. D. 161.

effect of this document. My opinion is that it is not a release of all claims, and the present claim is therefore not barred, and the view of the President is therefore right, that the order made in consequence of the agreement is merely an order of discontinuance. I felt a difficulty in reconciling the words "inevitable accident" with the previous words of the agreement, but the latter have a plain meaning, and we must not force them to bear a construction contrary to it. I think, therefore, that this appeal must be dismissed with costs.

LOPES, L.J. Our decision in this case must depend on what the nature of the transaction in 1883 was, whether it was an agreement to abandon all claims or a mere discontinuance of an action. If it was the latter, then the claim of the owners of the *Kron Prinz* is not barred. I am of opinion that it was a discontinuance of the then existing proceedings under Order XXVI., r. 1. The plaintiffs could have discontinued the action without the consent of the defendants on payment of costs. The consent of the defendants was obtained in order to prevent the payment of costs, and the words "inevitable accident" were put in as a reason for such consent. When these words were put in, it was not, I think, intended that they should nullify those which preceded them, and that the owners of the *Kron Prinz* intended absolutely to bar any future claim. As regards *The Bellcairn* (1), I think that it is clearly distinguishable from the present case, as there there was a res judicata, which does not exist here.

LORD COLERIDGE, C.J. I am not prepared to differ on this question of construction from my learned Brethren, but I do not in my own mind assent to the view they have taken. As regards the law there can be no doubt, and if the agreement in question was simply a discontinuance the owners of the *Kron Prinz* had a right to prove against the fund in court. Formerly at common law the plaintiffs could have discontinued on payment of costs, now there may be a discontinuance without payment of costs if the Court gives its consent. It seems to me, however, that the construction given to the agreement by the President would

(1) 10 P. D. 161.

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limit its operation to the question of costs. Such costs must clearly be a mere trifle, considering that the action had proceeded no further than the issue of the writ. It is difficult to believe that this agreement was intended to have so slight an effect, especially when the words "inevitable accident" were introduced into it. The real intention of the parties, in my opinion, was, that, having come to the conclusion that the collision arose through an inevitable accident, they would not sue each other in respect of it. Therefore they agreed to discontinue the action with a view to terminating all proceedings, such termination to be a final settlement of the dispute.

Solicitors for owners of cargo on the *Kron Prinz: Stokes, Saunders, & Stokes.*

Solicitors for owners of the *Kron Prinz: W. A. Crump & Son.*

Solicitors for owners of the *Ardandhu: Lowless & Co.*

E. S. R.

March 17, 18.

THE UNDAUNTED.

Towage—Efficiency of Tug for Service—Exemption of Owner from Liability.

There is an implied obligation in a contract of towage, that the tug shall be efficient and properly equipped for the service, and a proviso in the contract that the owners will not be responsible for the default of the master, does not release them from such implied obligation.

ACTION OF TOWAGE. The plaintiffs were the owners of the steam-tug *Knight Commander*, and claimed 110*l.* for towing the defendants' ship, the *Undaunted*, from Havre to Cardiff. The defendants denied that this amount was due, and paid into court 60*l.* as sufficient to cover the plaintiffs' claim. They alleged that the contract was to tow the *Undaunted* from Havre to Cardiff and dock her on or before the 29th of April. Also that the tug was not properly supplied with coal, and that at noon on the 28th of April she was obliged to cast off her tow and to run to Swansea to take in coal, and that after thirty-two hours' interval she picked the tow up again, and reached Cardiff with her on the 30th of April, and that the *Undaunted* could therefore not be docked till the 3rd of May. By their counter-claim the defend-

ants claimed damages for breach of contract, namely, five days demurrage, and the cost of two tugs for docking. The plaintiffs, by their reply, denied the breach of contract and the damages, and pleaded in the alternative that it was a term in the contract that they were not to be responsible for the default of the master.

It appeared that the contract was contained in several telegrams and letters between the plaintiffs at Liverpool and the master of the *Undaunted* at Havre, which were to the effect that the tug was engaged to tow the *Undaunted* on either the 26th or 27th of April from Havre to Cardiff for 110*l.*, the service to include one daylight tide for docking at Cardiff; the towage conditions to be according to the card sent by the plaintiffs to the master of the *Undaunted*. One of these conditions was that the plaintiffs were not to be responsible for the default of the master. The towage began at noon on the 26th, and continued till noon on the 28th, when the master of the tug, finding he had only fifteen tons of coal left, cast off and went to Swansea for a further supply. The tug and tow at that time were making very little way, there being a head wind from the N.W. The *Undaunted* was put under canvas, but remained in much the same position till she was again taken in tow by the tug on the 29th. They reached Cardiff on the 30th. Owing to the number of vessels which had already asked to be docked, the *Undaunted* was not able to be docked until the 3rd of May.

Raikes, for the plaintiffs. The plaintiffs are entitled to recover the full amount claimed. The tug was properly equipped: *The Lady Flora Hastings*. (1) The coals burnt out sooner than was reasonably anticipated, so that the supply fell short. Even if there was a breach of contract, the damages claimed have not been shewn to have resulted from it. Further, the plaintiffs by the condition on the card, which is part of the contract, are exempt from liability for the negligence of their master: *The United Service*. (2)

Barnes, and *Praed*, for the defendants. There is an implied obligation that the tug shall be fit for the service. This tug was

(1) 3 Wm. Rob. 118. (2) 8 P. D. 56.

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not fit, and the condition referred to cannot absolve the plaintiffs from their obligation to supply a tug properly equipped. The demurrage was caused by the delay in the progress of the towing.

Raikes, in reply.

BUTT, J. (after stating the facts, proceeded):—I am of opinion that when the *Knight Commander* left Havre she was not adequately supplied with coal. It is important that owners of steam-tugs should not be released from the obligation to send them to fulfil the service they have undertaken, adequately and properly equipped. The breach by tug-owners of this obligation may give rise to most serious consequences to vessels intrusted to their care. I have no doubt that the weather during the towage became worse than at its commencement the master of the *Knight Commander* anticipated it would be, though I am not prepared to say that it was worse than he should have expected. When the *Undaunted* was cast off, I think the tug and tow were making very little, if any, way. It has been argued that, assuming the coal on the *Knight Commander* when she started from Havre was insufficient, the plaintiffs are not responsible, because by the terms printed on the card, which is said to form part of the contract, the plaintiffs are freed from responsibility for the negligence of the master. But there being an implied obligation on the tug-owners to supply an efficient tug, that is to say, one properly equipped and properly supplied with coal, and as I have found that the tug was deficient in the latter respect, the plaintiffs would be liable, notwithstanding the exception contained on the card. Therefore up to the time when the *Knight Commander* cast off the *Undaunted,* the plaintiffs had not properly fulfilled their contract.

If it had been proved that any damage had resulted to the defendants from the tug leaving the *Undaunted,* I should hold the plaintiffs liable for it. But I am of opinion that no damage has been proved. The damage relied on in the counter-claim is the loss arising from the delay in docking the *Undaunted,* through her not arriving in time to dock on the evening tide of the 29th of April. But, in the first place, the contract was that the tug

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would tow the *Undaunted* to Cardiff, beginning the towage on the 26th or 27th of April. Had the towage begun on the 27th, the *Undaunted* would not, going at an ordinary towing speed, have arrived at Cardiff by the evening of the 29th; and even if there had been 100 tons of coal on the tug when off Trevose Head instead of fifteen, the vessels would not have arrived by the evening of the 29th. It is admitted that if the *Undaunted* had not arrived in time for the evening tide of that day, she could not have been docked earlier than she was. The result is that I hold that the tug-owners did not supply an efficient tug, but that no damage has resulted to the defendants therefrom, that the contract to tow was fulfilled, and that the plaintiffs are therefore entitled to the amount claimed. I give judgment for the plaintiffs both on the claim and counter-claim with costs.

Solicitors for plaintiffs: *Owles & Collinson, for Crowther & Miller, Liverpool.*

Solicitors for defendants: *Ingledew, Ince, & Colt.*

E. S. R.

THE JOHANN SVERDRUP.

Feb. 10; *March* 23.

Collision—River Tyne—Compulsory Pilotage—Tyne Pilotage Order Confirmation Act, 1865 (28 *Vict. c.* 44), *sched., ss.* 10, 11, 12, 16—41 *Geo.* 3, *c. lxxxvi.—Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 39.

The provisional order forming the schedule to the Tyne Pilotage Order Confirmation Act, 1865, contains a complete code of regulations respecting pilotage in the River Tyne, and its provisions supersede those of 41 Geo. 3, c. lxxxvi. Therefore under s. 16 of the schedule, pilotage is not compulsory in the case of either British or foreign vessels in the Tyne.

APPEAL by the plaintiffs in an action for damages arising from a collision in the Tyne on the 12th of October, 1884, against the decision of the judge of the County Court of Newcastle given on the 23rd of October, 1885. The judge found that the collision was occasioned by the faulty navigation of the defendants' vessel, the *Johann Sverdrup*, a Norwegian ship, and that the manœuvres which occasioned the collision were carried out solely under the direction of a duly licensed pilot for the Tyne, who was on board at the time. The judge further held that as the *Johann Sverdrup*

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was a foreign ship, she was bound by compulsion of law to have a pilot on board, and that on this ground the defendants were entitled to judgment.

The only question raised upon this appeal was whether pilotage in the Tyne is or is not compulsory on foreign vessels. The Acts on which the question turned are fully mentioned in the arguments and the judgment of the Court.

Feb. 10. *Barnes*, for the plaintiffs. By the Tyne Pilotage Order Confirmation Act, 1865 (28 Vict. c. 44), which confirms the provisional order which forms the schedule thereto, an entirely new code of laws was made for the regulation of pilotage in the Tyne. The pilot was on board the *Johann Sverdrup* under that code, which supersedes the former law: ss. 10, 11, 12. (1) If it is established that this schedule contains the existing law, then by s. 16 (2) it is clear pilotage is not compulsory, so that the county court judge was wrong in holding that 41 Geo. 3, c. lxxxvi., s. 6 (3),

(1) Schedule, s. 10: "The pilotage district of the Tyne shall for the purposes of this order be deemed to include the whole of the river Tyne, and to extend seaward over a radius of seven miles."

Sect. 11. "The jurisdiction in pilotage matters within the district aforesaid now vested in the Trinity House of Newcastle-upon-Tyne shall be and is hereby transferred to and vested in the hands of the commissioners incorporated by this order."

Sect. 12. "All pilots licensed for the Tyne or its entrance by the Trinity House of Newcastle-upon-Tyne at the commencement of this order, shall be entitled to continue to act as such pilot under the commissioners incorporated by this order for one year after the commencement of this order, without further license or payment in respect of that year, but in all other respects shall become and be subject to the authority of the commissioners and the provisions of this order as if they had been severally licensed under this order."

(2) Schedule, s. 16: "Nothing in this order shall extend to oblige the owner or master to employ or make use of any pilot in piloting or conducting such vessel into or out of the said district, or within any part thereof, if he is not desirous so to do, or to pay any pilotage dues when not employing or making use of a pilot."

(3) 41 Geo. 3, c. lxxxvi., s. 6: "And be it further enacted that the owners or masters of any foreign ships or vessels resorting to, or coming into, or departing from the said port of Newcastle-on-Tyne, or any of the creeks or members belonging thereto, shall, and they are hereby obliged and required respectively to receive, take on board and employ in the piloting and conducting such their ships or vessels such pilots to be licensed as aforesaid; and in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally, neverthe-

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was in operation, and that pilotage was compulsory in the case of this ship. The fact that by s. 15 of the schedule dues are to be paid does not make pilotage compulsory, having regard to the language of s. 16. Moreover the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 39 (1), allows a pilotage authority by provisional order to exempt vessels from compulsory pilotage, and so an interpretation of the provisional order of 1865 such as the plaintiffs contend for is clearly contemplated by the Act of 1862.

Sir W. Phillimore, and *Boyd*, for the defendants. Pilotage was compulsory in the case of the defendants' ship. The Tyne Pilotage Order Confirmation Act merely transfers the powers of the Trinity House of Newcastle to the Tyne Commissioners; and the law is as it was before 1865, namely that 41 Geo. 3, c. lxxxvi.,

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less, answer and pay to the master, pilot, and seamen the aforesaid pilotage duties, and the same shall be recoverable in the same manner as if such pilots had been actually received and employed: Provided always, that nothing in this Act contained, shall extend or be construed to extend to oblige or compel the owners or masters of any British ships or other vessels to employ or make use of any pilot or pilots in piloting or conducting such ships or vessels, if they shall not respectively be aminded or desirous so to do."

(1) 25 & 26 Vict. c. 63, s. 39: "Whereas it is enacted by the principal Act that every pilotage authority shall have power in manner and subject to the conditions therein mentioned to do the following things—that is to say, to exempt the masters of any ships or of any classes of ships from being compelled to employ qualified pilots; to lower and modify the rates and prices or other remuneration to be demanded and received for the time being by pilots licensed by such authority; to make arrangements with any other pilotage authority for altering the limits of their respective districts, and for extending the powers of such other authority and transferring its own powers to such last mentioned authority: And whereas it is expedient that increased facilities should be given for effecting the objects contemplated by the said recited enactments, and for further amending the law concerning pilotage, and that in so doing means should be afforded for paying due regard to existing interests and to the circumstances of particular cases: Be it enacted that it shall be lawful for the Board of Trade by provisional order to do the following things, that is to say—(1) . . . to transfer the whole or any part of the jurisdiction of the said pilotage authority to a new body corporate or body of persons to be constituted for the purpose by the provisional order so as to represent the interests of the several ports concerned. . . . (4) To exempt the masters and owners of all ships from being obliged to employ pilots in any pilotage district, or in any part of any pilotage district, or from being obliged to pay for pilots when not employing them in any district or in any part of any pilotage district, and to annex any terms and conditions to such exemptions."

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s. 6 (1), makes it compulsory on a foreign ship to take a pilot. There has been no exercise of the power given by the Merchant Shipping Act, 1862, s. 39, to the pilotage authority to abolish compulsory pilotage. Apt words would have been used for that purpose, and it is clear s. 16 (2) of the schedule was not intended as an exercise of this power. This is further shewn by the words of s. 22 (3) of the schedule. The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 353, keeps in existence the compulsory employment of pilots, "subject to any alteration to be made by any pilotage authority," and as there has been no alteration within the meaning of the Merchant Shipping Act, 1862, s. 39, the Act of 41 Geo. 3, c. lxxxvi., is still in force, and pilotage is still compulsory on foreign vessels.

Barnes, in reply. The dues imposed by the Act of 1865 are different from those previously in force, thus shewing that the schedule contained an entirely new set of rules.

Cur. adv. vult.

March 23. The judgment of the Court (the President and Butt, J.) was delivered by

BUTT, J. This is an appeal from a judgment of the County Court of Northumberland, held at Newcastle. The action was brought by the owners of the steamship *Rose* against the steamship *Johann Sverdrup* to recover damages occasioned by a collision between these vessels. The collision occurred in the River Tyne, at North Shields. The learned judge found that the damage was occasioned by the negligent navigation of the *Johann Sverdrup;* but that the fault was solely attributable to the pilot in charge, and that the employment of such pilot was by law compulsory on her owners, whom he therefore exonerated from liability. Against this decision the plaintiffs have appealed, and the only question with which we have at present to deal is whether the

(1) See note (3), ante, p. 50.

(2) See note (2), ante, p. 50.

(3) Schedule, s. 22: "Nothing in this order shall exempt the commissioners or the pilotage district aforesaid from the provisions of any general Act of Parliament now in force or hereafter to be passed relating to pilotage or pilotage dues, or to merchant shipping, or to ports, harbours, or docks, or to dues on shipping, or on goods carried therein, or from any future revision and alteration under the authority of Parliament of the pilotage dues authorized by this order, or of the limits of the district defined by this order."

pilotage was compulsory. The *Johann Sverdrup* is a Norwegian vessel. By an Act passed in the year 1801, entitled, "An Act for extending and enlarging the powers and increasing the rates and duties of the Corporation of the Trinity House of Newcastle-upon-Tyne, and for better regulating the port of Newcastle" (41 Geo. 3, c. lxxxvi.), it is provided in s. 6: "That the owners or masters of any foreign ships or vessels resorting to, or coming into, or departing from the said port of Newcastle, or any of the creeks or members belonging thereto, shall and they are hereby obliged and required respectively to receive, take on board, and employ in the piloting and conducting such their ships or vessels, such pilots to be licensed as aforesaid; and in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally, nevertheless, answer and pay to the said master, pilots, and seamen the aforesaid pilotage duties, and the same shall be recoverable in the same manner as if such pilots had been actually received and employed; provided always that nothing in this Act contained shall extend or be construed to extend to oblige or compel the owners or masters of any British ships or other vessels to employ or make use of any pilot or pilots in piloting or conducting such ships or vessels if they shall not respectively be aminded or desirous so to do."

A number of sections of different Acts of Parliament were referred to at the bar as bearing upon the question under discussion, but it seems to us that, so far as legislation is concerned, the section of the Act set forth above, remained in force from the time of its enactment in 1801 until the passing of the Tyne Pilotage Order Confirmation Act, 1865 (28 Vict. c. 44). It was, indeed, suggested that the right to impose compulsory pilotage on foreign ships had been discontinued by usage; and the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 332, was referred to; but it does not appear that any such by-law as that section contemplated was ever made; neither was any evidence of such usage given, although we gather from an observation of the learned judge of the Court below that for some time the provisions of s. 6 of the Act of 1801 had not been enforced. Sect. 39 of the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), provides as follows. [The learned judge read the section as set out in the note to the argument.] Sub-s. 6

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of s. 40 provides that no such provisional order shall take effect unless and until the same is confirmed by Parliament. In accordance with these enactments a provisional order relating to the pilotage of the River Tyne was made by the Board of Trade, and having been amended by Parliament was confirmed by the Tyne Pilotage Order Confirmation Act, 1865. Clause 16 of the provisional order provides as follows: "Nothing in this order shall extend to oblige the owner or master of any vessel to employ or make use of any pilot in piloting or conducting such vessel into or out of the said district, or within any part thereof, if he is not desirous so to do, or to pay any pilotage dues when not employing or making use of a pilot." The learned judge of the county court has held that inasmuch as the obligation to take a pilot was created by the Act of 1801 and not by the provisional order, clause 16 of that order cannot have the effect of exempting foreign ships from compulsory pilotage. We are unable to agree with this view of the matter. The provisional order transferred the jurisdiction in pilotage matters previously vested in the Trinity House of Newcastle-upon-Tyne to a new body, to be called the Tyne Pilotage Commissioners; it provided for the appointment, election, and incorporation of such commissioners; it defined the pilotage district of the Tyne; it provided for the examination and licensing of pilots, and for the levying of pilotage rates. It was, in our opinion, designed as a complete code for regulating pilotage in the River Tyne, and was intended to supersede, and did, in fact, supersede, the pilotage provisions of the Act of 1801. Sect. 6 of that Act imposes on foreign ships the employment of "pilots to be licensed as aforesaid," i.e., to be licensed by the Trinity House of Newcastle-upon-Tyne. The provisional order provides for the licensing of pilots by the Tyne Commissioners. The Act of 1801 authorized the Trinity House of Newcastle-upon-Tyne to levy pilotage dues on foreign greater than those on British ships. The provisional order imposes one scale of charges on all vessels alike. Liability to pay pilotage dues, although no pilot has been employed by the master of a vessel, has always been regarded as one of the chief indications of the employment of a pilot being compulsory. Clause 15 of the provisional order directs that the pilotage dues "shall be paid to the commissioners

or to the pilot performing such pilotage duty within five days after the performance thereof." And the provisional order contains no direction analogous to the following words in s. 6 of the Act of 1801: "And in case of their neglect or refusal to receive and employ such pilots as aforesaid they shall severally, nevertheless, answer and pay to the said master, pilots, and seamen, the aforesaid pilotage duties, and the same shall be recoverable in the same manner as if such pilot had been actually received and employed." In other words, no power is conferred on the present commissioners or the pilots to charge pilotage dues where a pilot has not been employed. Again, the only power given to the present pilotage authority—the Tyne Pilotage Commissioners—or to the pilots licensed by them to charge pilotage dues, even when a pilot is employed, is conferred by the provisional order. No such dues can be charged or enforced save under that order. When, therefore, clause 16 says, "Nothing in this order shall extend to oblige the owner or master of any vessel to employ" a pilot or to pay dues when not employing one, it does exempt all vessels, British and foreign alike, from compulsory pilotage. If it be said that the jurisdiction of the Trinity House of Newcastle-upon-Tyne is now transferred to the Tyne Pilotage Commissioners, and that therefore the power to charge and enforce the pilotage dues mentioned in the Act of 1801 is vested in them, the answer is that such jurisdiction being so transferred to the Tyne Pilotage Commissioners by the provisional order itself (clause 11), compulsory pilotage is expressly excluded by the words of clause 16. We therefore think the judgment of the county court must be reversed, and judgment entered for the plaintiffs with costs.

Appeal allowed.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendants: *Gregory & Co.*

E. S. R.

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Feb. 9.

[IN THE CHANCERY COURT OF YORK.]

IN THE MATTER OF A. B., CLERK.

Ecclesiastical Law—Letters of Request—Church Discipline Act (3 & 4 *Vict.* c. 86)—*Criminal Offence.*

Letters of request were presented to the official principal of the Chancery Court of York, requesting that a clerk might be cited before him to answer a charge that he had been guilty of a criminal offence, viz., of sodomy:—

Held, that the letters ought not to be accepted, for a charge of so grave a character ought not to be investigated by an ecclesiastical court, until the person charged had been tried and convicted by a criminal court of competent jurisdiction.

MOTION that the Right Honourable Lord Penzance, official principal of the Chancery Court of York, should accept certain letters of request, and that a citation should issue to a clerk in holy orders accused therein of having been guilty of the crime of sodomy. By "special act" the letters of request were presented to the Rev. E. A. Lane, surrogate of the official principal.

Lawton (proctor) appeared for the promoter.

April 8. The surrogate of the official principal read the following judgment:—

LORD PENZANCE. Letters have been addressed to the judge of this court by the Right Reverend Bishop of Carlisle, requesting that a clerk in holy orders may be cited to appear in this court to answer a charge of having been guilty of the crime of sodomy. In all ordinary cases the issue of a citation upon receipt of letters of request is almost a matter of course. But the issue of such a citation must necessarily be subject to the condition that the charge made and the offence which the party inculpated is called upon to answer, is one which is properly triable in this court, and triable without previous conviction in a court of criminal jurisdiction. The offence here charged is a crime of a highly penal character, punishable by the law of the land in the criminal courts, and *as such* is not triable or punishable elsewhere. As a crime this Court has no jurisdiction over it. But the act which

constitutes this crime is also a grievous offence alike against moral and ecclesiastical law, and it is in this aspect no doubt that the Court is asked to call upon the offender to meet the charge of having committed it. I am of opinion that it is not competent to this Court so to do until the guilt of the alleged offender has been ascertained by the verdict of a jury upon a prosecution for the criminal offence. If so tried and convicted, it would be incumbent, I apprehend, upon this Court upon proof of the conviction, without more, to proceed to inflict ecclesiastical censure, which in such a case as the present could not stop short of deprivation. That this is the only course of proceeding open to this Court will, I think, be apparent if the consequences of an opposite course are considered. For suppose the clergyman were to be tried here first and afterwards indicted. If acquitted here the court of criminal jurisdiction could not accept that acquittal as a defence without practically ousting the Queen's Courts of their jurisdiction over crime, and subordinating the temporal to the ecclesiastical judicature. No criminal court in the kingdom could admit a plea of "autrefois acquit" founded upon such an acquittal. Consequently the alleged offender must be put on his trial a second time, and a second time called upon to defend himself against the same charge—a result which is contrary to the entire spirit and practice of the system under which justice is administered in this country. But the difficulty does not end there. For in the case supposed, if the criminal trial were to result in a conviction the offender would be a convicted felon, and still in possession of his benefice, and any suit in this court *then* instituted to deprive him of it, might be effectually met by the plea that he had been tried and acquitted in this court on the same charge before. The results would be hardly less serious if the course of events were different, and the offender were first convicted here and afterwards acquitted by a jury of his countrymen in a court of assize—his character would in the eyes of the world have been irretrievably injured by the judgment of this Court, and his benefice taken from him by a sentence of deprivation though afterwards pronounced innocent of the very act by the supposed commission of which it had been forfeited. The truth is, that although an offence of the character

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here involved has two aspects, under one of which the offender is punishable as a criminal, and under the other is open to the censures of the Church, it is still but one act, and his guilt or innocence cannot be the subject of more than one judicial investigation, without a possible conflict of decisions, and the infliction thereby of much hardship and injustice. That being so, there can be no doubt that the alleged offender should be tried once for all, and only once, and it is equally clear, I think, that this trial should take place in the court which has cognizance of the act imputed to him in its most serious aspect—a breach of the criminal law of the country. I must decline therefore to permit the office of judge to be promoted in this court against the alleged offender, until his guilt has been ascertained by the judgment of a Court of criminal jurisdiction. This will create some delay, but will not create any difficulty in reference to the limit of two years under the Church Discipline Act, for there is a proviso in that Act introduced expressly to prevent any such difficulty arising. I will only add that I do not desire to lay down any general rule applicable to all offences called criminal, or all cases in which a resort to a Court of criminal jurisdiction is under some aspects possible. I may also point out that it may well be that an acquittal in a case like the present of the criminal offence will not necessarily preclude a suit in this court, for part of the conduct and acts complained of, though not constituting a criminal offence, may well be the subject of ecclesiastical censure.

Proctor for promoter: *W. Lawton.*

E. S. R.

[IN THE COURT OF APPEAL.]

1886
Jan. 27, 28.

WILLIS *v.* EARL BEAUCHAMP.

Administration — Practice — Staying Proceedings — Frivolous and vexatious Action—Action to revoke Administration against Representatives of deceased Administrator—Statute of Limitations (23 & 24 *Vict. c.* 38), *s.* 13.

An action was brought to obtain revocation of letters of administration granted in 1798, the plaintiff claiming to represent the next of kin of the intestate, and the defendants being the representatives of the deceased administrator :—

Held, that, having regard to the lapse of time, the fact that the defendants did not and could not succeed to the administration sought to be revoked, and the other circumstances of the case, the action was frivolous and vexatious, and must be dismissed.

The Probate Division has, apart from Order XXV., r. 4, an inherent jurisdiction, in common with other Courts, to stay proceedings which are frivolous and vexatious, and an abuse of the process of the Court.

APPEAL from an order of Butt, J., dismissing the action as being frivolous and an abuse of the process of the Court.

It appeared that William Jennens of Acton, died in 1798, a bachelor and intestate. In the same year letters of administration were granted to Earl Beauchamp and the Viscountess Andover as next of kin to the intestate. In 1817, after the death of those administrators, letters of administration de bonis non were granted to Catherine Countess Beauchamp, as executrix of Earl Beauchamp. In 1882 letters of administration de bonis non for a nominal sum were granted to one Isaac Martin.

The present action was brought by George Willis, as representing William Jennens of Belper, alleged to have been the true next of kin of William Jennens of Acton, against the present Earl Beauchamp and A. T. Coe, claiming revocation of the letters of administration of 1798 and 1817. The defendants were the present representatives of the administrators of 1798, and of the administratrix of 1817.

The property of William Jennens of Acton administered, was about 800,000*l.*, and the plaintiff, misunderstanding the terms used in a return to the Legacy Duty Office, stated that about 200,000*l.* more remained unadministered. This, however, was shewn to be a mistake.

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Inderwick, Q.C., and *Middleton*, for the plaintiff. There is nothing frivolous or demurrable in the statement of claim, and the Court has no jurisdiction under Order XXV., r. 4. The limitation of time under s. 13 of 23 & 24 Vict. c. 38, does not apply. The plaintiff is not suing the representatives of the administrator for administration of the estate, but is asking to have the grant of administration revoked. He claims administration, but until the existing letters of administration are revoked, he cannot obtain it. Where administration has been obtained on a false statement, the Act 23 & 24 Vict. c. 38, does not give protection, as the title of the administrator would have accrued only when the letters of administration were granted.

Jeune (*E. Clarke, Q.C.*, with him), for the defendants. The estate has been fully administered, and if the plaintiff succeeds he cannot get anything. Even if the administration was wrongly granted, the estate of the administrator is not liable, 20 & 21 Vict. c. 77, s. 77. Besides, the plaintiff does not ask to have administration granted to himself, which he must do if the old letters of administration are to be revoked. The original administrators are dead, and there is nothing to revoke. The Court has full power to dismiss a useless action under Order XXV., r. 4, and generally.

Inderwick, Q.C., in reply. The plaintiff asks to displace persons who were improperly appointed and improperly possessed themselves of the assets. It is said that nothing can be recovered, but if the administrators have improperly applied the assets their estates are liable. The Acts of 1857 and 1860 do not protect administrators where their payments are not bonâ fide.

COTTON, L.J. This is an appeal from an order made by the judge of the Probate Court dismissing the action on the ground that it was frivolous and vexatious. Reference was made to Order XXV., r. 4, but that in my opinion applies only to what appears on the pleadings, and enables the Court, demurrers being done away with, to act, if on the face of the pleadings the Court is of opinion that an action is frivolous and vexatious. But that is not the ground or principle upon which the case has been principally argued before us. The order was made in the exercise

of the undoubted jurisdiction of the Court to dismiss an action, when, on the facts proved to the satisfaction of the Court, it appears that the action is frivolous and vexatious, and an abuse of the process of the Court.

This action is of a somewhat curious nature. A person named Jennens died in 1798, and in that year administration was taken out to his estate by Lord Beauchamp and Lady Andover. They both died, and administration de bonis non was taken out in 1817 by Lady Beauchamp. That administratrix died, and administration de bonis non was granted to Isaac Martin in 1882. What the object of that was we are not told, but the personal estate not administered was then sworn to be under 20*l.*, so that administration was taken out for some other purpose, and not with the view of getting in any assets. Then the present plaintiff and others brought an action to get from Lord Beauchamp's representatives a large sum of money (the estate of Jennens) on the ground of some fraud on the part of Lord Beauchamp and Lady Andover. That action failed, and he has now taken proceedings against Isaac Martin to recall the letters of administration granted to him; and he has also commenced this action to have revoked the letters of administration which were granted in 1798, and also those which were granted in 1817.

What is his object? It was said on his behalf that this was necessary in order to enable him to establish his right to obtain administration to the deceased, he now coming forward and saying that he represents a nearer relative to the deceased than those who had obtained letters of administration in 1798. But so far as we can learn that is an erroneous view. If the letters of administration to Isaac Martin, which are still subsisting, are in the way of his obtaining the grant of letters of administration, undoubtedly he must get those letters of administration recalled or cancelled. But the power granted by letters of administration entirely ceases on the death of the persons to whom the Court has granted the administration. It is transmissible in no way to their representatives, and so far as one can see it cannot be in any way necessary to recall those letters of administration when the persons to whom they were granted have long since died, and all the power and authority granted to

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them has long since come to an end. The executors of administrators do not have any power under the letters of administration, and in no way do they represent the administrators, except as having the personal estate, which of course, the administrators had. So far as we can learn, although there was a difference here between counsel on each side as to what was the ordinary practice, the ordinary practice of the Court of Probate does not require in such a case that any such action as this should be instituted.

But to my mind that is not all. For what object is this action? As far as we can gather, when this matter was before the Probate Court, it was said to be, not that by means of getting these letters of administration which Mr. Willis, the plaintiff, desires to get granted to him, nor by revoking the previous letters granted in 1798 and 1817, was there any desire to get any property, but that it was a matter of sentiment. That was departed from here, and I asked, What evidence is there, or what ground is there, for supposing that there will be any good result as regards money if letters of administration are granted to the plaintiff? Looking at this action as an action which might be amended by making it one for a grant to Mr. Willis and bringing in Isaac Martin, and asking to recall his letters, Mr. Inderwick hardly suggested that there was any probability that if letters of administration were granted to the plaintiff, he would get any money by that means. It was indeed contended that a large sum remained unadministered.

[His Lordship then shewed that this was a mistake.]

Then it was said that the object of these proceedings is to set aside the letters of administration granted to Lord Beauchamp and Lady Andover, and the subsequent letters granted to Lady Beauchamp in 1817, in order to get rid of the statute of 1860 by which the plaintiff was defeated in his previous action. In my opinion it would not have any such effect. That statute protects the personal representatives in this way:—"After the 31st of December, 1860, no suit or other proceedings that shall be brought to recover the personal estate or any share of the personal estate of any person dying intestate possessed by the legal personal representative of such intestate but within twenty years

next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." It is very true that the letters of administration on which the title would rest, would have been granted only within a short period, but in substance this plaintiff is seeking to recover from those who are personal representatives of the administrators, on the ground that he is a nearer relative than the relatives to whom they handed over this personal estate. In my opinion, having regard to that statute, even if the letters of administration were recalled, the action against the representatives of those persons would be hopeless, and I cannot but look upon this action as one which is vexatious and unnecessary, and would produce no good result. It is calling upon the defendants here to contest the question of the relationship to the deceased after the vast number of years which have elapsed (nearly ninety years) without the probability of any good result arising therefrom. On all those grounds, therefore, in my opinion, the order made was right, and this appeal fails.

BOWEN, L.J. I am of the same opinion. I think this action ought to be stayed as being a vexatious action within the meaning attached to that word by the Courts, because it can really lead to no possible good. It does not fall under the rule as the Lord Justice has said, but the rules, as we have pointed out more than once, do not, and that particular rule does not, deprive the Court in any way of the inherent power which every Court has to prevent the abuse of legal machinery which would occur, if for no possible benefit the defendants are to be dragged through litigation which must be long and expensive.

We have had no satisfactory explanation offered to us why these defendants are made defendants in the suit. Grant of administration is a personal grant. On the death of the administrator there is no succession, and no authority derived from the original grant is transmitted to the personal representatives of the deceased administrator. It seems to me to follow from this, in the first place, that it is wholly unnecessary to apply to revoke the grant of letters of administration to a deceased person, because the grant is already extinct with his death. We have

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been unable to discover any precedent for such a suit, and though it is not necessary to say that it cannot be maintained, it appears to me clear that even in a suit to revoke administration granted to a deceased person, joining his personal representatives, is a misapprehension of legal principle. I cannot see how they have anything to do with such an action, and in fact I think they have been joined in this particular suit by a confusion of thought. It was felt that if the grant of administration which is being sought, or rather which is being sought in a collateral proceeding, is obtained, the parties against whom the plaintiff would ultimately desire to proceed for the purpose of recovering the personal estate which he supposes to be due to him would be the personal representatives of the deceased administrators. But it does not at all follow that because in these future proceedings they would be necessary parties—proceedings which could only be prosecuted if the plaintiff succeeds in the present application—that therefore the defendants are properly joined in the present application.

But if we proceed further and consider what possible advantage can be obtained by the plaintiff, there is no ground for supposing that he can get a single farthing of benefit or a single right declared which is of any value to him whatever. As regards all acts done by the administrator, the grant, even if it was set aside, would be voidable only, and not void, and the revocation of it would not displace all acts which have been done under the revoked grant. And as regards property outstanding, the ordinary Statutes of Limitation would apply. It may be that the plaintiff would desire further to avail himself of any remedies open to him for the original breach of trust, but without pronouncing absolutely that the Statute of 1860 would apply to such a case (though I am rather inclined to think it would, and to follow the Lord Justice in that view), it seems to me manifest that no case of any kind is made which would justify us in supposing that there is any property which could be recovered by the plaintiff even in case of the grant of letters of administration to himself. Under those circumstances I think this action ought to be dismissed as frivolous and vexatious.

It is quite true that one ought not lightly to stay an action at its inception or pronounce that frivolous and vexatious the object

of which is to ascertain and declare a right, but it is obviously for the benefit of both parties that we should explain to the plaintiff at this early point that he has really no rights which he can prosecute with any success.

FRY, L.J. I am of the same opinion. I think that this action ought to be stayed under the general jurisdiction of the Court to prevent the prosecution of frivolous and vexatious actions, and I think it is hardly going too far to say that an action begun nearly ninety years after the death of the person to whose estate it relates is almost primâ facie vexatious. I say that because one knows the presumption which the law lends in favour of the possessors of property and the existence of Statutes of Limitations, one or other of which is almost always found to stand in the way of proceedings after such a lapse of time.

I think, therefore, that we have been reasonable in requiring the plaintiff to shew us what fruits he expects to reap from this suit. It is suggested, in the first place, that there is outstanding property which he will be able to get in, but it seems to me to be very improbable; and the notion is only based on a misunderstanding. Then, in the next place, is suggested the probability of recovering property from the estates of either the first Lord Beauchamp or Lady Andover or the Countess Beauchamp, but really the plaintiff has laid before us nothing whatever which can induce us to believe that there is any probability of any such recovery of property. No doubt, suggestions of fraud have been thrown out, but they are entirely unsupported by any evidence to which we can attend.

But in my opinion this action is frivolous and vexatious on the pleadings themselves, and I say that even assuming the pleadings were to be amended by stating that this action is brought with a view to obtain letters of administration in another proceeding. I say so because it appears to me that the legal personal representatives of a deceased administrator have nothing whatever to do with defending the propriety of the grant of administration. They in no way claim under those letters of administration. They have no obligation whatever to defend or to discuss the propriety of them, and I cannot help agreeing with what has

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been said by Bowen, L.J., that the real object of the action is not to discuss with the defendants the propriety or impropriety of the grant of administration to their predecessors, but to prejudge a claim which it is suggested that the administrator, when appointed, may have against the personal estate of those deceased administrators—a right in equity or cause of action which is not stated in the present proceedings, and with which, of course, the Court has no concern.

I think, therefore, that this action ought to be dismissed, and the appeal dismissed for the reasons which have been given.

Appeal dismissed with costs.

Solicitor for plaintiff: *S. E. Lambert.*
Solicitors for defendants: *Walfords.*

C. M.

May 4.

BRODRIBB *v.* BRODRIBB AND WALL.

Divorce—Publication of Advertisements—Contempt of Court.

A co-respondent in a suit for divorce, immediately after the service of the citation, caused advertisements to be published denying the charges made in the petition, and offering a reward for information which would lead to the discovery and conviction of the authors of them:—

Held, that these advertisements constituted a contempt of Court.

THIS was a motion for an attachment against a co-respondent for the publication of certain advertisements during the pendency of a suit.

The suit was one in which the petitioner prayed for a dissolution of his marriage on the ground of his wife's adultery with the co-respondent. The citation was served on the co-respondent on the 3rd of April, and on the 5th of April the following advertisement appeared in the *Bristol Times*, the *Bristol Daily Post*, and another paper.

"Notice.

"26, Redcliffe Street, Bristol,
"3rd April, 1886.

"A notice having been served on me this day affecting my character and reputation, I take the earliest opportunity of giving

the charges therein contained the most unqualified denial, and I hereby offer a reward of one hundred guineas for such information as will lead to the discovery and conviction of the instigators of such charges.

J. C. Wall."

The solicitors for the petitioner immediately wrote to the conductors of the newspapers pointing out that the advertisements were of a character to suborn or intimidate witnesses, and they also wrote to the co-respondent's solicitors; but the advertisements continued to appear until the 17th of April.

E. R. Bartley Denniss, moved for an attachment against the co-respondent, on the ground that the advertisements constitute a contempt of Court. They are calculated to deter witnesses from coming forward to give evidence, and thus to defeat the ends of justice. In *Daw* v. *Eley* (1), where a solicitor had written letters to the newspapers under an assumed name, taking part in a controversy as to the novelty of a client's invention, Lord Romilly held that a contempt of Court had been committed, though he acquitted the solicitor of any improper motive, and thought he had only acted from want of judgment. He cited also *Pool* v. *Sacheverell.* (2)

Inderwick, Q.C. (*Middleton* with him), for the co-respondent. The advertisements may be regarded as offering a reward for the discovery of evidence, and in *Plating Co.* v. *Farquharson* (3) this was held not to be a contempt of Court. The co-respondent had acted under the first impulse of the charge brought against him, and had done, perhaps, what he would not have done had he taken advice.

THE PRESIDENT. There does not appear to be anything in the nature of an apology in the co-respondent's affidavit, and I must express my strong condemnation of his conduct, which is not in any way calculated to serve the interests of justice, and which, as tending to deter witnesses from coming forward to give evidence, is certainly a contempt of Court. I shall follow the course taken by Lord Romilly in *Daw* v. *Eley* (1), and I shall order this

(1) Law Rep. 7 Eq. 49. (2) 1 P. Wms. 675.
(3) 17 Ch. D. 49.

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attachment to go. But it may remain in the registry for a fortnight, in order to enable the co-respondent to make a proper apology.

[On the 11th of May the case was again before the Court, and *Inderwick, Q.C.*, read an affidavit from the co-respondent disclaiming any intention to interfere with the course of justice and expressing his regret. Whereupon the President rescinded the attachment on payment of costs.]

Solicitor for petitioner: *D. R. Soames.*

Solicitors for co-respondent: *Clarke, Woodcock & Ryland*, agents for *Fussell & Co.*, Bristol.

W. L.

May 4.

HOWARTH *v.* HOWARTH.

Divorce—Order for Deed securing Maintenance—Neglect to execute—Execution by Registrar—Supreme Court of Judicature Act, 1884 (47 & 48 *Vict. c.* 61), *s.* 14.

Where a respondent after decree absolute had been ordered to execute a deed securing a maintenance for the petitioner, and had neglected to comply with the order, the Court, under the powers of s. 14 of the Supreme Court of Judicature Act, 1884, directed the deed to be executed by the registrar.

In this suit a decree nisi dissolving the marriage between the parties was pronounced on the 18th of June, 1883, which was made absolute on the 13th of February, 1885. A petition for maintenance was filed on the 31st of October, 1883, which, by order made on the 19th of February, 1884, was served on respondent's solicitors and by advertisement. Respondent filed an answer on the 14th of February, 1885, and an order was subsequently made for a further answer, which the respondent did not obey. An order was made on the respondent on the 15th of June, directing him to attend before the registrar to be cross-examined on his answer, but he did not attend. The registrar thereupon proceeded to consider the petition for maintenance, and made his report, and on the 28th of July an order was made confirming the registrar's report, and directing (inter alia) that the respondent should secure to the petitioner the gross sum of £9100. This

order was referred to the registrar to deal with in the usual way, and a deed was finally settled in the terms of the order by the conveyancing counsel of the Court of Chancery, of which a copy was served on respondent's solicitor on the 16th of November, 1885. On the 30th of March, 1886, an order was made that the respondent within seven days do execute the deed as settled. The petitioner's solicitor being unable to effect personal service of this order obtained on the 6th of April an order dispensing with personal service and directing substituted service on the respondent's country solicitors and on their London agents. Notice was subsequently given that the deed was lying at the office of the petitioner's solicitors for execution, but the respondent has never executed the deed. On the 29th of April notice of motion for the 4th of May for an attachment against the respondent for non-compliance with the order of the 30th of March was served on the London agents.

On the 3rd of May a notice was served on the London agents of the respondent's solicitors that, on the motion for an attachment, on the following day, they should ask the Court either for an attachment, or in the alternative for an order directing that the deed carrying out the order of the 30th of March might be executed by some person to be nominated by the Court for that purpose.

C. A. Middleton now moved the Court to make an order directing that the deed should be executed by the registrar under the powers conferred by the 47 & 48 Vict. c. 61, s. 14. (1)

THE PRESIDENT made the order as prayed.

Solicitors: *Gregory, Rowcliffes, & Co.*

(1) The section is as follows: "Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed, or that such negotiable instrument shall be endorsed by such person as the Court shall nominate for that purpose, and in such case the conveyance, contract, document, or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it."

W. L.

1886
May 25.

[IN THE COURT OF APPEAL.]

IN THE GOODS OF SARAH REID.

Administration with Will annexed—Revocation—Married Woman—Intermeddling with Estate.

Administration with the will annexed was granted to a woman, who intermeddled with the estate, and subsequently married. Her husband deserted her and could not be found, and an application was accordingly made for a revocation of the grant, and a fresh grant to another person:—

Held (affirming the decision of Butt, J.), that the administratrix having intermeddled with the estate the grant could not be revoked.

SARAH REID died on the 12th of August, 1878, leaving a will duly executed, but containing no appointment of executors.

Administration with the will annexed was granted to her daughter, Louisa Reid, who entered upon the administration of the estate. On the 29th of October, 1879, she married A. E. Stower, who deserted her in 1880, and had not been since heard of. In October, 1885, the administratrix contracted to sell a leasehold house, part of the estate of the testatrix, but the purchaser objected to complete the purchase unless her husband joined in the conveyance. An application was accordingly made to the Court by the administratrix with the concurrence of the beneficiaries to revoke the letters of administration, and to grant administration to her brother, H. Reid.

Butt, J., refused the application on the ground that it was contrary to the practice of the Court to revoke the grant when the administratrix had intermeddled with the estate: and the application was now renewed before the Court of Appeal.

Hurrell, in support of the application. In *In the Goods of Dye* (1) probate was granted to an executor and an executrix, who was a married woman; and her husband having deserted her the probate was revoked and regranted to the executor alone. In that case she had not intermeddled with the estate. But in another case, *In the Goods of Ferrier* (2), a grant of administration with the will annexed limited to a particular part of the property

(1) 2 Rob. 343. (2) 1 Hagg. Eccl. Rep. 241.

was revoked, although the administrator had intermeddled with it. In the present case the Court might limit the revocation to the house which it was proposed to sell.

COTTON, L.J. This is an appeal from a decision of Butt, J., refusing to revoke a grant of letters of administration to a married woman, and to make a fresh grant to another person. In my opinion we cannot interfere with that decision. The only authority relied on was *In the Goods of Ferrier.* (1) But there the administration was limited to a particular property, of which the administrator was tenant for life. He assigned his interest to his son, and asked that the grant might be revoked and a fresh grant made to his son limited to that particular property. But this case is very different. Here there has been a general grant of administration, and the administratrix has intermeddled with the general estate; and she now asks that the grant may be revoked either as to the general estate or as to the particular part which she wishes to have sold. I think it would be a dangerous practice to make such an order without some authority. The appeal must be dismissed.

LINDLEY, L.J. I should have been willing to accede to the application if there had been any precedent for it. But there is none.

LOPES, L.J., concurred.

Solicitors: *Hurrell & Laurence.*

(1) 1 Hagg. Eccl. Rep. 241.

M. W.

1886

April 6.

THE ZOE.

Limitation of Liability—Claim against Fund in Court—Right of the Crown—Time—Laches—Admiralty Suits Act, 1868 (31 & 32 *Vict. c.* 78), *s.* 3.

The Crown may claim against a fund paid into court by the owners of a ship in order to limit their liability under the Merchant Shipping Acts, 1854 and 1862, by the general law, and also under the Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 3.

A claim against a fund paid into court in a suit for limitation of liability under the Merchant Shipping Acts, 1854 and 1862, is not necessarily excluded by the fact that the time fixed by the order of the Court for entering claims has elapsed.

Motion by the Commissioners for executing the office of Lord High Admiral of the United Kingdom that they might be allowed to come in and enter their claim, in respect of the loss of certain goods of the Crown, against a fund in Court.

The facts of the case were as follows:—On the 21st of May, 1885, the Court pronounced the *Zoe* to be alone to blame for a collision between that vessel and the *Dannebrog*, by which both vessels were sunk. The owners of the *Zoe* commenced an action to limit their liability, and on the 21st of July, 1885, the usual decree was made. By this decree a certain sum representing the value of the *Zoe* at 8*l.* per ton was to be paid into court, and it was ordered that advertisements should be inserted in the *Times*, the *Shipping and Mercantile Gazette*, and a Marseilles paper, "intimating to all persons having any claim in respect of loss or damage caused as aforesaid, that if they do not come in and enter their claims on or before the 21st of October, 1885, they will be excluded from sharing in the aforesaid amount."

The *Zoe* was laden with stores belonging to the Crown. It appeared that the assistant director of transports applied in March, 1885, to the Board of Trade to know if an inquiry into the loss of the *Zoe* would be held, and he was informed it was not intended to hold one. From time to time, for some months afterwards, he applied to the Admiralty shipping agents as to whether any legal action was being taken in other interests, and they stated that an action by the owners of the cargo on the *Dannebrog* had been abandoned. On the 19th of March the Admiralty

received a letter from their agents enclosing one from Messrs. Pritchard & Sons, the solicitors of the owner of the *Zoe*, asking if any claim was to be made by the Crown, as the claim of the owners of the *Dannebrog* and of her cargo had been investigated, and it was desired to pay the claims at once out of the fund in court, a payment which would absorb two-thirds of the fund. The Admiralty's shipping agents stated that they had not seen the advertisements, and had no knowledge of the legal proceedings. The value of the stores belonging to the Crown largely exceeded the value of the fund in court. Under these circumstances the Crown applied to be allowed to claim pro ratâ against this fund with the other claimants, although the time for sending in the claim had elapsed.

Sir C. Russell, A.G., and *Staveley Hill, Q.C.* (*A. T. Lawrence* with them), for the Crown. Although in the opinion of the law officers of the Crown the Crown is not bound by the Acts regulating suits for limitation of liability: 17 & 18 Vict. c. 104, ss. 503 and 514, and 25 & 26 Vict. c. 63, s. 54, it proposes to exercise the same rights as other suitors, and claim against the fund in court. This course is authorized by the Admiralty Suits Act, 1868, 31 & 32 Vict. c. 78, s. 3. (1)

Secondly, while a fund is in court a suitor will be allowed to claim against it, and the claim is not excluded simply by being out of time. This is the rule in Bankruptcy and Chancery pro-

(1) Sect. 3. "The Admiralty may institute any action, suit, or proceedings concerning naval or victualling stores, or other her Majesty's stores, goods, or chattels under the charge or control of the Admiralty, or any stores, goods, or chattels sold or contracted to be delivered to or by the Admiralty for the use or on account of her Majesty, or the price to be paid for the same, or any loss or injury of or to any such stores, goods, or chattels as aforesaid, or concerning any contract with the Admiralty relative to the execution of any work, or the doing of anything, or concerning any matter arising under or in relation to any such contract, or concerning any periodical or other payment or due payable to the Admiralty, or concerning any debt, damages, claim, demand, or cause of action or suit whatever arising out of any matter in anywise relating to the rights, powers, or duties of the Admiralty, or to property vested in or purchased by or being under the management or control of the Admiralty, in like manner and form (as nearly as may be) as if the question in dispute were one between subject and subject."

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ceedings: Daniell's Chancery Practice, vol. ii., p. 1019 (6th ed.); *Angell* v. *Haddon*. (1) There has been no laches such as will prejudice the other claimants.

Sir W. Phillimore, and *Stubbs*, for the owners of the *Dannebrog*. Laches bars a claim such as this: *Hull* v. *Falconer* (2); and there has in this case been laches on the part of the Crown. The Crown is not bound by the Merchant Shipping Acts in regard to limitation of liability, and therefore cannot claim against this fund, for the statutes only affect suitors who are bound by them.

[They referred to the *Magdalen College Case* (3); *Ex parte Postmaster-General, In re Bonham*. (4)]

Barnes, and *Hannen*, for the owners of the *Zoe*.

Staveley Hill, Q.C., in reply.

BUTT, J. I have some doubt whether the Crown is not bound to come in and claim pro ratâ with the other claimants against the fund in court. However, it is unnecessary to decide this point, because, assuming it not to be bound, it clearly may elect to come in and to claim rateably with the other suitors, just as if this were a proceeding in bankruptcy. I hold that this may be done apart from the Admiralty Suits Act, 1868, by which express power is in my opinion given to the Crown to come in and claim, like an ordinary suitor, against a fund paid into court in a suit for limitation of liability. But it has been argued that even if the Crown is in the position of an ordinary suitor there has been such laches on its part as to bar the present claim. No doubt there may be such laches as will deprive a claimant of indulgence, if he makes a claim after the proper time for making it has expired. The case of *Hull* v. *Falconer* (2) was to this effect, but it differed in its circumstances from the present case. It is impossible to deny that there has been undue delay on the part of the Crown, I may even say laches, but not, I think, of such a character as to compel me to exclude the present claim. I therefore grant this application, on condition that the Crown pay the costs of this motion, also costs occasioned to the other claimants by the Crown not coming in in time, and that the assessment

(1) 1 Mad. 529.
(2) 11 Jur. (N. S.) 151.
(3) 11 Rep. 66 b.
(4) 10 Ch. D. 595.

of the damages of the other claimants by the registrar and merchants be not disturbed. 1886

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Solicitors for the Crown: *Hare & Co.*

Solicitors for the owners of the *Dannebrog*: *Stokes, Saunders, & Stokes.*

Solicitors for the owners of the *Zoe*: *Pritchard & Sons.*

E. S. R.

IN THE GOODS OF AVARD. *May* 11.

Administration—Intestacy—No known Relatives of Intestate—Grant de bonis non to Nominee of Duchy of Lancaster.

Where an intestate had died leaving no known relatives, and his estate had been partly administered by his widow, who died leaving a will, the Court made a grant de bonis non to the nominee of the Duchy of Lancaster, who was the residuary legatee of the widow.

THE Rev. Theodore John Avard, of Bolton Road, Birkdale, in the county of Lancaster, deceased, died the 6th of September, 1874, intestate, without child, brother, sister, or any known relatives, leaving a widow, Margaret Avard, who in November, 1874, took out letters of administration to the estate of her deceased husband, and for some time intermeddled in the estate. She died shortly afterwards leaving part of the estate unadministered. By a will duly executed she appointed Mrs. Charlotte Cooper, wife of the Rev. F. Cooper, of St. Peter's Church, Birkdale, in the county of Lancaster, her residuary legatee.

Since that time a sum of 500*l.* had become due to the estate of Mr. Avard. On the 18th of January, 1886, Her Majesty, by warrant under the royal sign manual, countersigned by the Chancellor of the Duchy of Lancaster, authorized Mr. F. W. Biscoe, the Procurator-General for the Duchy of Lancaster, to apply for a grant de bonis non of the estate of Mr. Avard to be made to Mrs. Cooper.

Bayford, Q.C., moved for the grant in these terms.

[THE PRESIDENT. Why not to the solicitor to the Duchy?]

Mrs. Cooper is the residuary legatee of the original adminis-

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tratrix, and the Duchy has waived its claim to a considerable portion of the estate, and Mrs. Cooper is entitled to the remainder under the will of the widow.

THE PRESIDENT. I must presume that the Duchy will look after its own interests, and I am satisfied therefore that the grant should go as prayed.

Solicitor: *F. W. Biscoe.*

W. L.

March 9.

IN THE GOODS OF JOSEPH CLAYTON.

Administration—Grant to a Nominee—20 & 21 *Vict. c.* 77, *s.* 73.

The Court will, but under special circumstances only, make a grant of administration to a nominee of the parties interested in the estate.

JOSEPH CLAYTON, late of Preston, near Broughton, in the county of Lancaster, engineer and iron founder, executed his will on the 15th of April, 1884, and died on the 30th of November, 1885.

The trustees and executors of the will had renounced probate and letters of administration with the will annexed, and disclaimed the trusts.

By the will the testator had given (amongst other bequests) a legacy of 7000*l.* to his son John Clayton, and had named his son Charles Clayton residuary legatee.

The property of the testator consisted chiefly of his business, which if it were at once realized would not be sufficient to pay the creditors in full; but if it were carried on, sufficient might be obtained to fully satisfy the creditors and pay the legatees at least half of their legacies.

It had therefore been agreed by a majority of the creditors and other persons, parties interested in the estate, that the business should be carried on by Messrs. John and Charles Clayton, and the agreement had been sanctioned by a Court of the Chancery Division which had appointed them trustees for the purpose

Inderwick, Q.C., and *Middleton*, moved, under 20 & 21 Vict.

c. 77, s. 73 (1), for a grant of joint administration with will annexed to John Clayton as a legatee, and Charles Clayton as the residuary legatee named in the will: *In the Goods of Grundy* (2); *Woodfall* v. *Arbuthnot.* (3) This case is distinguishable from the case of *In the Goods of Richardson* (4) in that this estate is insolvent.

BUTT, J. To make a grant as asked would be contrary to the ordinary practice, which the Court will not depart from merely because the parties interested desire it. In order to justify this application, some of the circumstances contemplated by s. 73 of 20 & 21 Vict. c. 77, should exist, and in my opinion they do exist in this case, because I understand the creditors desire that the business should be carried on by the persons who have been named trustees by the Court of Chancery, inasmuch as it is expected that there will then be enough to pay the creditors, and probably some portion of the legacies, and though the business could be carried on by the trustees if the grant were made to one of them who is also a residuary legatee, such a proceeding would be contrary to the wishes of the creditors, and practical difficulties might arise.

I think, therefore, there are sufficient reasons for making a grant under s. 73.

Solicitors: *Gregory, Rowcliffes, & Co.*

(1) 20 & 21 Vict. c. 77, s. 73: "Where a person has died or shall die —leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate—and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, other than the person who if this Act had not been passed would by law have been entitled to a grant of administration of such personal estate—it shall be lawful for the Court in its discretion to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct."

(2) L. R. 1 P. & D. 459.

(3) L. R. 3 P. & D. 108.

(4) L. R. 2 P. & D. 244.

R. A. P.

1886
June 1.

IN THE GOODS OF H. T. BARBER.

Administration—Presumption of Death—Notice to Insurance Company.

Where the estate of a person whose death the Court was asked to presume consisted in part of a policy of assurance on his life, the Court ordered that notice of the application should be given to the insurance company.

H. T. BARBER left this country to go to the Australian Gold Diggings in December, 1852. He arrived at Melbourne in May, 1853, and remained in the colony engaged in mining in various places until 1874, when he went to New South Wales. He continued to communicate with his friends at home, and in 1877, having then returned to Melbourne, he announced his intention of returning home. He actually engaged a passage, but owing to some accident he missed his ship. He thereupon determined to go to Sydney by the overland route, and started in October, 1877, since which time neither his friends in this country nor in the colony have heard anything of him. Advertisements have been inserted in the principal newspapers in Victoria and New South Wales, but there has been no response to them.

The estate of H. T. Barber consisted of his share in the residuary estate of a testator, who died in 1883, of the value of 929*l.* 17*s.*, and a policy of assurance of £300*l.* on his life in the National Life Assurance Society, subject to a mortgage.

Searle moved on the usual affidavits for leave to swear the death of H. T. Barber as having occurred in or since the month of October, 1877, the date of the last letter received from him.

[BUTT, J. Have you communicated with the insurance company?]

No; it has not been the practice.

BUTT, J. In these cases we are asked to proceed very much in the dark, and I think before any order is made we ought to take every step which appears to be likely to throw light on them. Those who are interested in shewing that the man is alive ought certainly to have the opportunity of doing so if they

can. You must give notice to the insurance company, but subject to that, the death may be presumed as having occurred in or since October, 1877. 1886 IN THE GOODS OF BARBER.

Solicitor: *C. H. Robertson.*

W. L.

IN THE GOODS OF T. H. GOSLING. *March* 30.

Probate—Revocation—Wills Act (1 *Vict. c.* 26), *s.* 20—*Obliteration*—"*Writing declaring an intention to revoke.*"

The testator had obliterated the whole of a codicil, including his signature, by thick black marks, and at the foot of it had written the words, signed by himself and attested by two witnesses: "We are witnesses of the erasure of the above":—

Held, that the codicil was revoked, for the words above mentioned were "a writing declaring an intention to revoke" it within s. 20 of the Wills Act.

T. H. GOSLING, late of Richmond, Surrey, made his will on the 12th of June, 1880. On the 10th of November, 1880, he made a codicil in a few lines on the back of the sixth sheet of his will, and subsequently he made four other codicils which in no way referred to the first codicil. On attending for the purpose of the execution of one of these latter codicils Mr. Elliott, his solicitor, found that he had obliterated by means of thick black ink marks the whole of the first codicil, including his own signature and the subscriptions of the attesting witnesses, and that there was written at the foot of the obliterated codicil the following words:—

"We are witnesses to the erasure of the above
October 10th, 1881.
Emily Hart. T. H. Gosling."
Jane Green."

The effect of the obliteration was to make the whole illegible.

The registrar had directed the opinion of the Court to be taken on the matter.

It was proved by the affidavit of Jane Green that the deceased had written himself the above words with the exception of the names of the witnesses, and that they were duly executed according to the Wills Act.

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IN THE GOODS OF GOSLING.

R. A. Pritchard, on behalf of the executors, moved the Court to declare that these words were a writing declaring an intention to revoke within s. 20 of the Wills Act. He referred to *Ford* v. *De Pontes*. (1)

BUTT, J. The intention of the testator is so manifest, and the writing, though it does not come up quite to the letter of the statute, is so clearly within its intention that I grant the application and exclude the first codicil from probate.

Solicitor: *W. Timbrell Elliott.*

R. A. P.

March 16.

IN THE GOODS OF JAMES LEVERINGTON.

Will—Witness—Subscription.

A will was signed by the deceased in the presence of two persons, one of whom subscribed it with his own name and the other with the name of her husband:—

Held, that the will was not properly attested.

JAMES LEVERINGTON, late of Attleborough, in the county of Norfolk, carter, deceased, made his will, dated the 2nd day of September, 1873, and died on the 5th of April, 1885.

The will had no attestation clause, and was signed by the deceased and purported to have been attested by Benjamin Buddell and Frederick Leverington. It was read over and signed by the deceased, in the presence of Benjamin Buddell and Sarah Ann Leverington, the wife of Frederick Leverington, who, after the deceased and Benjamin Buddell had signed their names, signed her husband's name at the request of the deceased instead of her own, her husband being unable to write. Her husband was not present when the deceased signed.

Searle moved for probate. All the next of kin consent that the opinion of the Court may be taken on motion: 1 Vict. c. 26, s. 9; Williams on Executors (8th ed.), p. 96; *Charlton* v. *Hindmarsh* (2); *In the Goods of Duggins* (3); *In the Goods of Elizabeth*

(1) 30 Beav. 572. (2) 8 H. L. C. 160; 1 S. & T. 433.
(3) 39 L. J. (N.S.) P & M. 24.

Trevanion (1); *In the Goods of White* (2); *In the Goods of Kileher* (3); *In the Goods of Sperling* (4); *In the Goods of Maddock* (5); *In the Goods of Cope.* (6)

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IN THE GOODS OF LEVERINGTON.

BUTT, J. Upon the authority of the cases cited I am of opinion that the will was not properly attested. Probate refused.

Solicitor: *Jameson.*

R. A. P.

WINGROVE *v.* WINGROVE AND OTHERS.

Will—Undue Influence.

1885

Nov. 19.

By SIR JAMES HANNEN (President). To establish undue influence sufficient to invalidate a will, it must be shewn that the will of the testator was coerced into doing that which he did not desire to do, and the mere fact that in making his will he was influenced by immoral considerations does not amount to such undue influence so long as the dispositions of the will express the wishes of the testator.

THE plaintiff as a legatee propounded a will dated the 15th of September, 1869, of Elizabeth Wingrove, late of 87, Long Lane, West Smithfield, and alleged that a codicil dated the 9th of October, 1880, which revoked some of the gifts to him, was procured by the undue influence of the defendants. The defendants in the statement of defence denied that the codicil was procured by undue influence, and claimed probate of it together with the will. The action had been tried by a common jury, who found a verdict for the plaintiff, which was subsequently set aside and a new trial ordered by a special jury.

Murphy, Q.C., and *Gye*, appeared for the plaintiff, and *Inderwick, Q.C.*, and *Pritchard*, for the defendants, in the second trial.

The burden of proving the undue influence being upon the plaintiff, his counsel opened the case.

SIR JAMES HANNEN (President), in addressing the jury said:—Gentlemen of the jury, I must ask your particular attention to

(1) 2 Robert. 311.
(2) 2 Notes of Cases, 461.
(3) 6 Notes of Cases, 15.
(4) 3 S. & T. 273.
(5) L. R. 3 P. & D. 169.
(6) 2 Robert. 335.

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Sir J. Hannen.

the exposition which I am about to give you of the law upon this subject of undue influence, for I find, from now a long experience in this Court, that there is no subject upon which there is a greater misapprehension.

The misapprehension to which I have referred arises from the particular form of the expression. We are all familiar with the use of the word "influence"; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.

To be undue influence in the eye of the law there must be—to sum it up in a word—coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak

and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence unless the testator is in sucha condition, that if he could speak his wishes to the last, he would say, "this is not my wish, but I must do it."

If therefore the act is shewn to be the result of the wish and will of the testator at the time, then, however it has been brought about—for we are not dealing with a case of fraud—though you may condemn the testator for having such a wish, though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to adopt that view—still it is not undue influence.

There remains another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced.

Solicitor for plaintiff: *James E. Dunn.*
Solicitors for defendants: *Hillearys & Co.*

R. A. P.

1886
March 9.

FARRINGTON *v.* FARRINGTON AND SCHOOLES.

Divorce—Variation of Settlements.

Upon application to vary a marriage settlement after a decree for divorce on the husband's petition, it appeared that the wife's income under the settlement amounted to 1050*l.* a year. The husband possessed an income of about 600*l.* a year, part of which arose from money received from the respondent. There were no children of the marriage.

The Court varied the trusts of the settlement by ordering the trustees to pay the husband 300*l.* a year during the joint lives of husband and wife.

THIS was a motion to confirm the report of the Registrar as to a variation of the marriage settlement.

A decree absolute was made on the 12th of May, 1885, by reason of the adultery of the respondent and co-respondent.

By an indenture of settlement made on the marriage of the petitioner and respondent certain property of the respondent was settled upon trust (amongst other things) for the respondent for life, and after her death for the petitioner if he survived her, and after the death of both, in the event of there being no children of the marriage, for the next of kin of the respondent.

There were no children of the marriage. The property in settlement amounted to 24,000*l.*, yielding an income of about 1050*l.* The petitioner is a colonel in the army, with pay of about 440*l.* a year and sundry allowances, but he has to keep two horses. In July next he must retire or go on half-pay. If he retires his income would be about 420*l.* a year, and if he goes on half-pay his income will be 200*l.* a year and he will receive a lump sum of 600*l.*, and would be eligible for further service. He has a further income of 200*l.* a year, part of which arose from funds amounting to 1350*l.* received from the respondent. The report suggested that the trustees of the settlement should pay the petitioner out of the income of the trust moneys 300*l.* during the joint lives of the petitioner and respondent.

Middleton, for the petitioner, moved that the report be confirmed.

Bayford, Q.C., and *Searle*, objected. The petitioner is out of

time, as the motion has not been made within fourteen days from the filing of the report: rule 102.

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The Court overruled the objection.

[The cases of *March* v. *March and Palumbo* (1) and *Wigney* v. *Wigney* (2) were cited.]

BUTT, J. Under all the circumstances of this case I think the respondent has no right to complain if I adopt the Registrar's report.

Motion granted.

Solicitors for petitioner: *Lewis & Lewis.*

Solicitor for respondent: *W. W. Comins.*

R. A. P.

[IN THE COURT OF APPEAL.]

March 3.

LANGWORTHY *v.* LANGWORTHY.

Nullity of Marriage—Provision for Children—Postponement of making Decree Absolute—20 & 21 *Vict. c.* 85, *s.* 35—22 & 23 *Vict. c.* 61, *s.* 4—23 & 24 *Vict. c.* 144, *s.* 7—29 *Vict. c.* 32, *s.* 3—36 *Vict. c.* 31, *s.* 1.

A decree nisi was made declaring a de facto marriage void, as not having been solemnized according to law. Shortly before the expiration of the period of six months, a petition was presented for a provision for the child of the marriage. On a motion to make the decree absolute, Butt, J., held that a provision for the child ought to be inserted in the final decree, and refused to make the decree absolute until materials were furnished for deciding what provision ought to be made:—

Held, by the Court of Appeal, that under 23 & 24 Vict. c. 144, s. 7, there is no absolute right to have a decree made absolute at the end of the six months, and that although the judge might have made a provision after the decree absolute, he had jurisdiction to suspend the making the decree absolute for the purpose of inserting in it the provision which he considered necessary, and the Court would not interfere with his discretion, there being nothing to shew that he had exercised it unreasonably.

The Act 20 & 21 Vict. c. 85, s. 35, enables the Court to order a provision to be made for the children of a marriage which the Court has declared to be void.

MRS. LANGWORTHY in November, 1883, presented a petition for the restitution of conjugal rights, alleging that she was lawfully married to the respondent on the 10th of January, 1883; that there was issue of the marriage one child born in the same year; that the respondent without just cause compelled her to

(1) L. R. 1 P. & D. 440. (2) 7 P. D. 177.

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leave him and refused to allow her to cohabit with him. The respondent in answer to the petition alleged: 1. that no form or ceremony of marriage was ever had between the petitioner and the respondent; and 2, that no lawful marriage was ever had between them, and the respondent prayed for a sentence of nullity of marriage.

In June, 1884, the petitioner applied for alimony pendente lite, but, as the fact of there having been any marriage ceremony was in issue, no order was made. At the hearing on the 7th of July, 1885, the President dismissed the petition, and on the application of the respondent decreed that the marriage in fact had and solemnized on the 10th of January, 1883, between the petitioner and the respondent, be pronounced and declared to be absolutely null and void, as not having been solemnized according to law, and that the respondent be pronounced to have been and to be free from all bond of marriage with the petitioner, unless sufficient cause be shewn to the Court why the decree should not be made absolute within six months from the date of this decree. The costs of the proceedings were given to the petitioner. It was further ordered that the decree should be without prejudice to any right the petitioner might have to alimony or maintenance, and that the child of the de facto marriage should remain in the custody of the petitioner till further order, but should not be removed out of the jurisdiction without leave of the Court.

On the 14th of August, 1885, an order was made for alimony at the rate of 1200*l.* a year. On the 2nd of February, 1886, the case came before Butt, J., upon motion to make the decree absolute. A petition had in the meantime been presented for a provision for the child, and counsel for the petitioner did not oppose the making the decree absolute, but asked that directions for the provision might be inserted in it. The respondent's counsel not being prepared to go at once into the question what provision should be made, Butt, J., refused to make the decree absolute till the terms of the provision had been ascertained. The learned judge accordingly made an order by which "the Court refused to make the decree nisi herein absolute until terms of provision for the child, E. G. Langworthy, be ascertained for the purpose of being inserted therein." The respondent appealed.

Inderwick, Q.C., and *Middleton*, for the respondent. The power of making provision for children was first given by 20 & 21 Vict. c. 85, s. 35, and it was to be exercised before or "*in*" the final decree. The more elastic word "on," in s. 32, was held by the House of Lords, in *Sidney* v. *Sidney* (1), to authorize the making a provision for a wife after the final decree. As regards the provision for children, the making it after decree was expressly authorized by 22 & 23 Vict. c. 61, s. 4. It therefore is not necessary to suspend the final decree till provision is made, since the provision can be made afterwards, and there being no cause why the decree should not be made absolute, it ought to be made so at once, the prescribed period having expired: *Stoate* v. *Stoate*. (2) The application for a provision ought to have been made earlier, instead of being kept back till just before the decree was to be made absolute. Moreover there is no right to a provision, for the child of an invalid marriage is not a child of the "marriage" of its parents.

Bayford, Q.C., and *Rose-Innes*, for the petitioner. It was laid down in *Watton* v. *Watton* (3) that there is no absolute right to have a decree nisi made absolute at the end of the prescribed period, the language of the statutes being only that it shall not be made absolute sooner: 23 & 24 Vict. c. 144, s. 7; 29 Vict. c. 32, s. 3. In *Latham* v. *Latham* (4) the making a decree absolute was suspended in order to give the Queen's Proctor time for inquiries. The judge therefore, in the present case, was within his jurisdiction in suspending the making the decree absolute, and if he thought that justice could be best done by the course he has taken, the Court of Appeal will not interfere with his discretion.

Inderwick, Q.C., in reply.

COTTON, L.J. This is an appeal from a decision of the judge of the Probate and Divorce Division refusing to make a decree nisi absolute at the end of the six months, on the ground that he had power to order provision to be made for the child of the marriage which has been declared void, and that he had jurisdiction to refuse to make the order absolute until such provision had been made. The appellant urged that under 22 & 23 Vict. c. 61,

(1) 36 L. J. (P. & M.) 74 (see *Bradley* v. *Bradley*, 3 P. D. at p. 49).
(2) 2 Sw. & Tr. 384.
(3) Law Rep. 1 P. & D. 227.
(4) 2 Sw. & Tr. 299.

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s. 4, the Court could make an order for a provision for the child after the decree had been made absolute, and that therefore it was unnecessary to suspend the making it absolute. No doubt the judge might have made the provision afterwards, but that does not dispose of the case. Originally, under 20 & 21 Vict. c. 85, decrees were made absolute in the first instance, but by 23 & 24 Vict. c. 144, s. 7, it was enacted that every decree for a divorce should in the first instance be a decree nisi, not to be made absolute till after the expiration of a certain time, and this by 36 Vict. c. 31, is extended to suits for nullity of marriage. The appellant contends that after the lapse of that time he has a right to an order absolute. Now it would be a singular state of things if where an order from a judge is necessary he is to be held to have no discretion as to making it. If the Act had said that after the prescribed period the decree should become absolute the case would stand very differently, even if it had still been necessary that the judge should make an order. But the Act does not say that the decree shall be made absolute at the expiration of the time, it only prohibits the making it absolute at any earlier date. Then had not the judge power to direct the case to stand over to enable him to insert in the final decree directions which he had jurisdiction to insert in it? By 20 & 21 Vict. c. 85, s. 35, it is enacted that "in any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding." When the final decree is made, that is, as the law now stands, when the decree nisi is made absolute, provisions may be made in it for the benefit of the children, and if the Court comes to the conclusion that such provisions ought to be inserted, and has not materials before it for saying what those provisions ought to be, I think the judge has power to direct the matter to stand over till those materials are furnished, and that is what the judge here has done.

Now, does the enactment apply to this child although there was no valid marriage? I am of opinion that it does. The section

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refers to the children not "of the marriage" but "the marriage of whose parents is the subject of such suit or other proceedings." The section includes sentences of nullity of marriage, and must, therefore, in my judgment, be considered as enacting that in cases where there is no valid marriage the children of the union may be provided for. I am of opinion, therefore, that the judge acted within his jurisdiction, and in the circumstances of this case I think that he exercised that jurisdiction reasonably.

BOWEN, L.J. I am of the same opinion. I think that the making the decree absolute is not a mere matter of form, but that the Court retains its power over the proceedings till the decree is made absolute. In the reason of the thing it ought to be so, and I think that under the terms of 23 & 24 Vict. c. 144, s. 7, it is so; for that section does not direct that the decree nisi shall become absolute at the expiration of a prescribed time, but only fixes a time within which it shall not be made absolute.

FRY, L.J. I am of the same opinion, and think that the decision results from the terms of 20 & 21 Vict. c. 85, s. 35. The expression, "may make such provision as it may deem just and proper," casts on the Court a judicial duty to make a provision if in its opinion the circumstances require it. Butt, J., said in fact: "I wish to discharge this duty, but I have not materials before me to enable me to do so. I will therefore postpone the case till I have them." In my opinion it was within his jurisdiction to do this, and I cannot say that he acted unreasonably. It was urged that a postponement was unnecessary, because he could have made the provision after the decree had become absolute; but if he thought it was best that the provision should be incorporated in the decree, it was his duty to take that course. It was suggested that this child, being the offspring of a void marriage, is not within the section; but for the reason given by Cotton, L.J., I am of opinion that it is. The matter, then, was one for the discretion of the judge, and I see no reason whatever for saying that he did not exercise it reasonably.

Appeal dismissed.

Solicitors for petitioner: *Lumley & Lumley.*

Solicitors for respondent: *Bircham & Co.*

H. C. J.

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June 3.

[IN THE COURT OF APPEAL.]

THE HARVEST.

Collision—Bye-laws for the Regulation of the River Tyne, 1884—*Bye-law* 20.

Bye-law 20 of the Regulations of the River Tyne, 1884, must be taken to mean that a vessel is not to cross from north to south, or from south to north, close up to the pier-heads, but is to get on a proper course when at some considerable distance outside the pier-heads.

APPEAL from a decision of Butt, J. (ante, p. 14), whereby he held the *Harvest* alone to blame for a collision between that vessel and the *Stainsacre*. The facts are fully set out in the report of the case before Butt, J.

The defendants, the owners of the *Harvest*, appealed.

Hall, Q.C., and *Raikes*, for the defendants.

Sir W. Phillimore, and *Barnes*, for the plaintiffs.

LORD HERSCHELL, L.C. This is an appeal from the judgment of Butt, J., whereby he found the *Harvest* alone to blame for a collision between that vessel and the *Stainsacre* at the mouth of the Tyne. The case chiefly turns on the view to be taken of the facts, but it is also necessary to consider the meaning of bye-law 20 of the Tyne Regulations. (1) It was at first suggested that this bye-law only applied when a vessel was being taken out of or was entering the port, across an imaginary line drawn between the two pier-heads. But bye-law 19 regulates the navigation of the river down to this point, so that clearly bye-law 20 applies to the parts outside the imaginary line. In my opinion it regulates the manner in which vessels shall be brought to or taken from the place at which bye-law 19 begins to operate. The true construction of bye-law 20 is that put on it by Butt, J., that

(1) Code of Bye-laws for the Regulation of the Port and of the Northumberland and Albert Edward Docks and the river and docks and staiths belonging to the Tyne Improvements Commissioners, 1884. Bye-law 20: "Every steam or other vessel (whether towing any other vessel or not, or being towed) shall, unless prevented by stress of weather, be brought into the port to the north of mid-channel, and be taken out of the port to the south of mid-channel."

a vessel shall not begin to make for the river and to shape her course up it too near the piers, but shall keep well out before crossing the line from south to north. [The Lord Chancellor then dealt with the facts of the case, and upheld the decision of Butt, J.]

LORD ESHER, M.R. Bye-law 20 of the Tyne Regulations applies to parts outside the port, that is, it applies outside the piers and at the entrance to the port and to vessels which are being brought into or out of the port. How is it to be applied in practice? Clearly a vessel coming in from the south must not make for the spot, where she is to bring the two leading lights which guide her up the river into line, by coming near the pier-heads, so as not to leave room for vessels coming out of the river. She must keep a reasonable distance outside before she turns to go up the river. If a vessel is coming out, and wishes to go to the north, she must go some distance out from the pier-heads, before she turns northwards, and thus leave a fair way for vessels coming into the port from the north.

FRY, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Turnbull, Tilly, & Mousir.*

E. S. R.

1886
June 1.

THE KEROULA.

Co-Ownership—Action of Restraint—Bail Bond.

Where the defendants in an action of restraint have given a bond for the safe return of the ship they are still at liberty to dispute the plaintiffs' right to bring the action, and the Court, if satisfied that the plaintiffs have no such right, will set aside the bond.

ACTION of restraint. The plaintiffs, as owners of eight-sixty-fourth shares in the steamship *Keroula*, claimed by their writ of summons a bond for the value of their shares, and for the safe return of the vessel, in the sum of 1500*l*. A bond in this sum to secure the payment of 1500*l*. if the owners should not, in the event of the *Keroula* not safely returning to some port in England, pay the plaintiffs that sum, was entered into by two sureties.

The following pleadings were subsequently delivered:—

"Statement of claim.

"(1.) The plaintiffs are the lawful and registered owners of eight-sixty-fourth shares in the steamship *Keroula*.

"(2.) At the time of the institution of this suit the said steamship was lying in the River Tyne, or in one of the docks adjacent thereto, in the possession of the defendants, who were about to dispatch her on a voyage against the will of the plaintiffs, who always disapproved of and dissented from and protested against any such employment of the ship, and desired that it should not be employed in trading or attempting to trade for the present.

"(3.) After the institution of the suit the defendants appeared in the action and gave a bail bond to the plaintiffs for the safe return of the ship to the satisfaction of the plaintiffs, and as claimed by the plaintiffs, and the plaintiffs are satisfied with the bail bond, but the defendants have required the plaintiffs to deliver a statement of claim, and in accordance with such demand, and in compliance with the Rules and Orders of Court, the present claim is delivered.

"(4.) The plaintiffs claim that the Court should pronounce for the liability of the defendants to answer judgment in the action, and for the validity of the bail bond, and condemn the defendants

in the cost of these proceedings, and for such other and further relief as the nature of the case may require."

"Statement of defence.

"The defendants say as follows:—

"(1.) The plaintiffs are not the lawful owners of eight-sixty-fourth shares of the said steamship. The plaintiffs, although registered as owners of the shares, hold the same only by way of security for the repayment of a loan from Messrs. Porteous & Senior, who are owners of the said shares.

"(2.) At the time of the institution of this suit the *Keroula* was under charter for a voyage from the Tyne to Savona, and the defendants pointed out to the plaintiffs that they were only mortgagees of the shares, and not entitled to commence an action of restraint, but the plaintiffs persisted in their claim, and the defendants, rather than suffer the arrest of the steamship, which would have caused very serious damages, entered an appearance in the action, and gave under protest a bail bond for the safe return of the steamship, at the same time stating that they would hold the plaintiffs responsible for all cost and damages occasioned by their proceedings.

"(3.) Save in so far as they are consistent with this defence the defendants deny the several allegations contained in the statement of claim.

"(4.) The defendants submit that it was gross negligence on the part of the plaintiffs to institute or proceed with the said action after the notice, and the defendants pray that the bail bond may be delivered up to them to be cancelled, and that the plaintiffs be condemned in the cost of this suit and also in all damages and expenses arising out of the proceedings, and that, if necessary, a reference may be made to the registrar to report the amount of such damages and expenses."

The action now came on for hearing. The question of fact as to whether the plaintiffs were mortgagees or owners turned on the construction of certain letters, to which it is unnecessary to refer for the purposes of this report.

Raikes, for the plaintiffs. There are three points in favour of the plaintiffs. First, the plaintiffs are owners, and therefore entitled to bring an action of restraint; secondly, even if they

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THE KEROULA.

are not, the bond was given under a duress of goods, and therefore cannot be set aside: *Skeate* v. *Beal* (1); thirdly, it is now too late to ask the Court to set aside a bond which is in the form in which a final bond in a restraint action is given: *The Robert Dickinson.* (2)

Boyd, for the defendants. The plaintiffs are mortgagees, and cannot bring an action of restraint: *The Innisfallen.* (3) The defendants gave notice that the plaintiffs' claim was disputed, and have a right to have the bond set aside, if the Court finds as a fact that the plaintiffs are only mortgagees.

Raikes, in reply.

THE PRESIDENT. I am clearly of opinion that the plaintiffs have failed in their contention. *The Innisfallen* (3) decides that the Court is at liberty to look behind the register, and after the investigation of the facts I am of opinion that the plaintiffs are only mortgagees. *The Innisfallen* (3) is an authority that a mortgagee not in possession cannot bring an action of restraint, though it does not go to the length of deciding that a mortgagee in possession may not take such proceedings. The plaintiffs, therefore, were not entitled to institute this action. Then there arises the question whether by giving a bond the defendants have deprived themselves of the right to contest the plaintiffs' claim. There has here been no duress of goods, and therefore *Skeate* v. *Beal* (1) is no authority in the present case. The plaintiffs asserted their right to seize the vessel, and the defendants gave bail, and also gave the plaintiffs notice that they disputed their liability. The bail bond was in the form usual in actions of restraint, and I can only regard the giving of it as a step in the litigation. That being so, the defendants are not now contending for anything to which they are not entitled. The bail bond must, therefore, be set aside, with costs. But as there was no gross negligence or bad faith on the part of the plaintiffs, I shall not condemn them in damages.

Solicitors for the plaintiffs: *Parker, Garrett, & Parker.*
Solicitors for the defendants: *Downing, Holman, & Co.*

(1) 11 Ad. & E. 983. (2) 10 P. D. 15. (3) Law Rep. 1 Ad. & E. 72.

E. S. R.

[IN THE COURT OF APPEAL.]

1886
June 10.

HOWARTH *v.* HOWARTH.

Divorce—Practice—Judicature Act, 1884 (47 & 48 *Vict. c.* 61), *s.* 14—*Execution of Deed by Person nominated by the Court—Jurisdiction—Substituted Service.*

The jurisdiction given by the Judicature Act, 1884, s. 14, when any person neglects or refuses to comply with an order directing him to execute any instrument, to order the execution of the instrument by some person nominated by the Court to do so, may be exercised by the Probate Division of the High Court of Justice; and the order may be made upon a motion for attachment for non-compliance without formal service of a fresh notice of motion, provided the person to be affected by the order has by himself or his solicitor received notice that the application to the Court will be made in the alternative form.

In the Probate Division when personal service of notice of motion to attach for non-compliance with an order cannot be effected and the original order has been duly served, substituted service, by analogy to the practice in the other Divisions of the High Court, is sufficient.

Appeal by J. W. Howarth, the respondent in a suit in the Divorce Division for dissolution of his marriage, from an order of the President under the Judicature Act, 1884, s. 14, directing the registrar to execute a deed securing to the petitioner, Ada Howarth, a sum of 9100*l.* which the respondent had been ordered on the 28th of July to execute, but had not done (see ante, p. 68). A decree nisi dissolving the marriage was pronounced on the 18th of June, 1883, and on the 13th of February, 1885, the decree was made absolute. A petition for maintenance was filed by the petitioner pending the proceedings for dissolution of the marriage, and on the 28th of July, 1885, an order was made confirming the registrar's report, and directing that the respondent should secure to the petitioner the gross sum of 9100*l.* A deed was finally settled by the conveyancing counsel of the Chancery Division in the terms of the order, of which a copy was served on respondent's solicitors on the 16th of November, 1885. On the 30th of March, 1886, an order was made that the respondent within seven days do execute the deed as settled. The petitioner's solicitor, being unable to serve this order personally, obtained on the 6th of April an order dispensing with personal service, and directing substituted service on the respondent's

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solicitors in the country and their London agents. On the 29th of April notice of motion for the 4th of May for a writ of attachment against the respondent for non-compliance with the order of the 30th of March was served on the London agents. On the 3rd of May before 5 P.M. a clerk of the petitioner's solicitors delivered a letter addressed by them to the London agents of the respondent's solicitors giving them notice that on the motion for an attachment they should "ask the Court either for an attachment, or in the alternative for an order directing that the deed referred to in the order of the 30th of March might be executed by some person to be nominated by the Court for that purpose." On the following day (May 4), on the motion coming on, petitioner's counsel applied that the registrar might be ordered to execute the deed on behalf of the respondent in accordance with s. 14 of the Judicature Act, 1884. The President, subject to production of evidence of service of notice of the alternative motion, upon an affidavit being filed of the service of notice of the above application, made an order that inasmuch as the respondent had neglected or refused to comply with the order of the 30th of March, 1886, Mr. Middleton, one of the registrars, be, and was thereby, nominated by the Court to execute the deed in order that the same should for all purposes be available as if it had been executed by the respondent J. W. Howarth.

From this order the respondent appealed.

E. B. Stone, for the respondent. The order of the 4th of May is bad on the following grounds: 1. The notice of motion for an attachment is invalid, inasmuch as it was served on the solicitors, and not on the respondent personally, and, independently of the practice of the Divorce Court (see Rules and Regulations for Her Majesty's Court for Divorce and Matrimonial Causes, 1865, r. 115), it is settled that except by special leave notice of motion for an attachment must be served personally: *Mann* v. *Perry*. (1) 2. Even if service on the solicitors of the notice of motion of the 29th of April for an attachment was sufficient, the motion for attachment was abandoned, and the order of the 4th of May was made upon fresh notice of application given by

(1) 50 L. J. (Ch.) 251.

letter to the appellant's solicitors, and not to him personally, at 5 P.M. on the day before the application was made in Court, whereas rule 115 requires that notice of any motion to be made to the Court "shall be served on the opposite parties who have entered an appearance four clear days previously to the hearing of such motion." Any order, therefore, which was based upon such invalid notice was inoperative and must be discharged. 3. The President had no jurisdiction to make the order under the Judicature Act, 1884, s. 14, as that Act does not apply to proceedings in the Probate and Divorce Divisions of the High Court.

Middleton, for the petitioner, in support of the order. Service of notice of motion for a writ of attachment upon the solicitor of the party to be attached is sufficient service within the meaning of Order XLIV. r. 2: *Browning* v. *Sabin* (1), *In re A Solicitor* (2), and therefore the notice of motion of the 29th of April was duly and properly served. The Judicature Act, 1884, s. 14, clearly applies to proceedings in the Probate and Divorce Division. It was thought right to adopt the alternative of compelling obedience to the order of the 30th of March by the less stringent but more satisfactory course afforded by that section, in preference to pressing for an actual attachment. It was no new application requiring fresh notice to be served, but an amended application on which it was competent to the President to act by giving something less than that which was first asked for. If the Court should be of opinion that the order was obtained without due notice to the respondent, application to rescind the order should have been made to the President: Rules and Regulations of Probate and Divorce Court, r. 116, and the matter is not a proper subject for appeal.

E. B. Stone, in reply.

[COTTON, L.J. The question seems to be whether an order under s. 14 could be made ex parte; but could not the Court, on the motion for an attachment, make what I may call a minor order?]

No. The respondent ought to have had an opportunity of appearing when any order is applied for against him, either for an attachment or under s. 14.

(1) 5 Ch. D. 511. (2) 14 Ch. D. 152.

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COTTON, L.J. This appeal seeks to obtain the discharge of an order made by the President of the Probate and Divorce Division, and there are two points taken. The first was not much pressed, but would, if maintainable, be of great importance. It is said that the Judicature Act, 1884, under s. 14 of which the order appealed from was made, does not apply to proceedings in the Probate Division. There is no possible ground for this contention. The Act applies to the various Divisions and to all the judges of the Supreme Court, except when the context shews otherwise, and this objection is entirely without foundation. Then with respect to the other objections: the respondent, by the order of the 30th of March, 1886, was ordered to execute the deed, and as he could not be found so as to effect a personal service on him of that order, an order was obtained on the 6th of April for substituted service of the above order on his country solicitors and on their London agents, and both were duly served. The deed was ready, but the respondent did not execute it, and on the 29th of April notice of motion for the 4th of May for an attachment for non-compliance with the order of the 30th of March was served on the solicitors of the appellant. It was objected on behalf of the appellant that this notice of motion was not served on him personally, but on his solicitors, which, it is said, is insufficient. But this is not so. It is said that by the language of rule 115: "When it is necessary to give notice of any motion to be made to the Court, such service shall be served on the opposite parties who have entered an appearance four clear days previously to the hearing of such motion"—personal service is implied. It is true that the term "parties" refers to plaintiffs and defendants; but what is the nature of the service which is required is quite a different question. Rule 114 expressly draws a distinction between serving notices and copies of pleadings, and personal service; whereas in rule 115 personal service is not mentioned at all. On the construction of the rule, therefore, this contention is unfounded. It is true that the Court does not, except in certain special cases, send a man to prison unless there has been personal service, and it was quite proper in this case to serve the order of the 30th of March on a person substituted for him in order to insure his having personal notice of the order.

What was done was to follow up that order, and it was not necessary that notice of every step taken in pursuance of the order should also be personally served. This is the course of practice in the High Court under Rules of Supreme Court, 1883, Order XLIV., r. 2, as is shewn by *Browning* v. *Sabin* (1), where Jessel, M.R., under the corresponding rule of 1875 (which is almost identical with that of 1883), held that service of notice of motion for a writ of attachment upon the solicitors of the defendant on the record was sufficient, the original order having been personally served on him. It is true that in *Mann* v. *Perry* (2) Bacon, V.C., refused to make an order for an attachment without personal service, or without some evidence that there was a reason for not making personal service. This last case, however, lays down the true principle, that where there is no difficulty about personal service of a motion to attach, the Court may insist on such service. But where there is a difficulty in effecting personal service of the notice, and the original order has been personally served, then it would be wrong for the Court to refuse to act on proof of service in the ordinary form on the party's solicitor. It is a very different matter when the attachment is asked against someone who is not a party to the action; there the service must be personal, as he has no solicitor upon the record. In my opinion, therefore, the notice of motion of the 29th of April was duly and properly served.

Now if an attachment only had been asked for on the hearing of the motion, the Court would have been authorized and even bound to make the order, and if we were now to discharge the order under appeal we should grant an attachment in substitution for it. But the question is whether the Court was empowered to make an order in the form it did? Speaking generally, I should say that it would not be right to make an order under s. 14 without giving notice to the other side. But in this case the notice of motion was intended to enforce compliance with and to carry out the order of the 30th of March, and the only purpose of an attachment was to put that pressure upon the respondent which would compel him to do that which he ought to have done, viz. to obey the order. The legislature has by s. 14 conferred

(1) 5 Ch. D. 511. (2) 50 L. J. (Ch.) 251.

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on the Court the power of itself doing what a person has been ordered to do and has not done. Such a person has no right to say that he prefers going to prison; he is compellable to obey the order of the Court. In my opinion, therefore, it was not wrong nor beyond the power of the Court to take the course it did instead of enforcing its order by imprisonment. It is said that what the Court really acted on here was the letter which reached the appellant's solicitor only on the afternoon of the day before the application was made, but this is incorrect. What the Court really acted on was the notice of the 29th of April, but it did not adopt this alternative remedy until it was satisfied that appellant's advisers had actually received notice that an order under s. 14 would be asked for. The appeal fails, and must be dismissed with costs.

LINDLEY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitors: *Marsland, Hewitt, & Everett; Gregory, Rowcliffes, & Co.*

F. G. A. W.

June 26.

KEYSE *v.* KEYSE & MAXWELL.

Divorce—Assessment of Damages.

By SIR JAMES HANNEN (President). In assessing damages against a co-respondent the jury is not to seek to punish him, but is only to give compensation for the loss which the husband has sustained, and is to consider whether this loss has been caused by the action of the co-respondent.

In a case where the wife has not been seduced away from the husband by the co-respondent the jury must take into consideration the conduct of the husband and the protection or assistance which he may have afforded to her after the separation.

The means of the co-respondent are not in any way to be considered as a measure of damages.

THIS was a petition by the husband praying for a dissolution of his marriage with the respondent on the ground of her adultery with the co-respondent, and damages were claimed.

The parties were married in 1875, and cohabited together until July, 1883, when the respondent left her home. There were five

children born of the marriage. The petitioner was a licensed victualler carrying on business in Leather Lane, and subsequently in Lower Thames Street, and the co-respondent was a widower with children who was in the habit of frequenting both these houses. The respondent several years after her marriage became irregular in her conduct, neglected her household and children, kept late hours, and ultimately left her home. All trace of her was lost for some time, but she was ultimately found living with the co-respondent to whom she had borne a child.

There was no denial of the adultery, but in mitigation of damages the co-respondent was called, and swore that he had not been criminally intimate with the respondent until September, 1884. The case was heard before the President with a common jury.

Tatlock, for the petitioner.

Middleton, for the co-respondent.

THE PRESIDENT, in summing-up to the jury, said:—There is no doubt about the adultery, it has been proved and admitted; and the question therefore that remains for you to consider is what damages, if any, the co-respondent is to pay. Now I am obliged to explain the principle upon which damages are to be given; and, first, you must remember that you are not here to punish at all. Any observations directed to that end are improperly addressed to you. All that the law permits a jury to give is compensation for the loss which the husband has sustained. That is the only guide to the amount of damages to be given. But, undoubtedly, if it is proved that a man has led a happy life with his wife, that she has taken care of his children, that she has assisted in his business, and then some man appears upon the scene and seduces the wife away from her husband, then the jury will take those facts into consideration. But the question in this case, as in so many others, is, whether or not these losses have been cast upon the petitioner by the action of the co-respondent. If he did not seduce her away from her husband that makes a very material difference in considering the amount of damages to be given. In considering these questions undoubtedly the conduct of the husband must be looked to. Here the husband and

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wife had been leading an unhappy life before they parted, and he knew she had no means of living. It is for you to judge whether he had really made any effectual efforts to discover where she was —effectual, I mean, in the sense of being such as a man would really take if he had his heart in the inquiry. If you come to the conclusion that he did not make any earnest inquiry after her, that is a fact you could consider when you are considering the question of the damages he has sustained by some man consorting with his wife afterwards. What can any husband expect who has separated from his wife, who he knows has no means? What will follow? Why, that in the ordinary course of things she may yield to the temptation of securing support from some other man. Therefore, take those matters all into your consideration in determining whether or not the petitioner is entitled to damages, and, if so, to what amount.

[In the course of the summing-up a juror asked what were the means of the co-respondent.]

THE PRESIDENT:—I am not at all surprised at your asking the question; but that indicates the great misapprehension that exists on this subject. It is not a single case, but it is very often asked. But do you not observe, on the principles that I have explained to you, the means of the co-respondent have nothing to do with the question? The only question is what damage the petitioner has sustained, and the damage he has sustained is the same whether the co-respondent is a rich man or a poor man.

The jury found a verdict for the petitioner, and assessed the damages at 150*l.*

Decree nisi with costs.

Solicitor for petitioner: *W. J. Foster.*

Solicitors for respondent and co-respondent: *Simpson, Palmer, & Co.*

W. L.

[IN THE COURT OF APPEAL.]

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March 24, 25.

STANHOPE *v.* STANHOPE.

Divorce—Death of Petitioner after Decree Nisi and before Decree Absolute—Revivor.

A husband who had obtained a decree nisi for dissolution of his marriage died before the time for making it absolute had arrived:—

Held, affirming the decision of the President, that the legal personal representative of the husband could not revive the suit for the purpose of applying to make the decree absolute.

On the 11th of May, 1883, the petitioner obtained a decree nisi for dissolution of his marriage on the ground of his wife's adultery. On the 27th of July, 1883, he died.

The petitioner's father, who died in 1881, had directed the trustees of his will to stand possessed of 15,000*l.* upon trust to pay the income to the petitioner for life, and upon further trusts under which it was held by Chitty, J., that his widow was entitled for life, and subject to those interests upon trust for the husband's children as therein mentioned, and in default of children upon such trusts as the husband should by will appoint.

The petitioner died without issue, and left a will, by which he appointed the 15,000*l.* among his surviving brothers and sisters, one of whom was his executor.

In 1886 Chitty, J., decided that the respondent, who had since the petitioner's death married again, was entitled to a life interest. The petitioner's executor thereupon gave notice of motion "for an order giving him leave to intervene and revive the above suit, with a view, amongst other things, of applying to the Court to make absolute the decree nisi dissolving the marriage between the petitioner and the respondent pronounced on May 11th, 1883." The President refused the motion, and the executor appealed.

1886. March 24, 25. *Sir Walter Phillimore*, and *Bargrave Deane*, for the appellant. It cannot have been the intention of the legislature that if a husband dies shortly after a decree nisi his wife should retain the benefits arising from her conjugal position

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because the decree has not been made absolute, a proceeding which is generally mere matter of form. *Grant* v. *Grant* (1) is relied on by the respondent. There the petitioner died after decree nisi but before the time for making it absolute had arrived. The children asked to be allowed to intervene for the purpose of varying a settlement, and the application was refused. In that case there was no application to revive, and notwithstanding this decision the Court has after the death of the husband made orders for varying settlements, *Ling* v. *Ling* (2), which shews that the suit continues, and that applications may, therefore, be made in it. There is no statutory power to vary settlements apart from a suit, so the suit must in such cases have been considered to be pending.

[BOWEN, L.J. You are giving executors a right to carry on proceedings which the husband himself might have dropped.]

Baker v. *Baker* (3) shews that this proceeding is not a purely personal right, but may be enforced by a party other than the husband himself.

[COTTON, L.J. There Lords Justices authorized the committee to do on behalf of the lunatic what it was to be supposed the lunatic would have done if sane.]

The case only applied the old rule of the Ecclesiastical Court as shewn by *Parnell* v. *Parnell.* (4) Death after verdict and before judgment does not prevent signing judgment and issuing execution: *Palmer* v. *Cohen* (5); *Kramer* v. *Waymark.* (6) From the time when decrees nisi were introduced there was no appeal to the House of Lords till the decree was made absolute. This was altered by 44 & 45 Vict. c. 68, s. 10, which made the decree nisi the important thing, and the litigation is virtually at an end when the decree nisi is made: *Stoate* v. *Stoate* (7); *Latham* v. *Latham.* (8)

[BOWEN, L.J., referred to *Norman* v. *Villars* (9) and COTTON, L.J., to *Ellis* v. *Ellis.* (10)]

The final decree relates back to the decree nisi, and is not an

(1) 2 Sw. & T. 522.
(2) 4 Sw. & T. 99.
(3) 5 P. D. 142–152; 6 P. D. 12.
(4) 2 Hagg. Cons. 169.
(5) 2 B. & Ad. 966.
(6) Law Rep. 1 Ex. 241.
(7) 2 Sw. & T. 384.
(8) Ibid. 299.
(9) 2 Ex. D. 359.
(10) 8 P. D. 188.

independent decree: *Prole* v. *Soady* (1); and when the decree nisi has been made the parties are so far divorced that it has been questioned whether cohabitation between them is not adulterous. The 207th of the Divorce Rules provides for the decree nisi being made absolute on an application in writing by the solicitor of the petitioner. If revivor cannot be ordered leave should be given to apply under that rule. The President has treated this as a purely personal action, but it is not so; it affects rights of property; it affects not only the petitioner's person but his personal estate, and is not within the rule "Actio personalis moritur cum personâ": *Phillips* v. *Homfray* (2); *Twycross* v. *Grant.* (3)

[COTTON, L.J. There the object of the action was to recover something which if recovered would go to the executor. Here an alteration in the title to property is not the object of the suit, but only an incidental result.]

The case comes within the principle of the statute 17 Car. 2, c. 8, the decree nisi being equivalent to a verdict, which may be followed by a final judgment, though there is a death in the interval.

Bayford, Q.C., and *Middleton*, for the respondent, were not called upon.

COTTON, L.J. The object of this application is to obtain leave to intervene and revive the suit with a view to applying to the Court to make absolute the decree nisi for dissolution of the marriage between the deceased petitioner and the respondent. What is the position of the parties after a decree nisi? Neither of them can do anything in the suit until the time comes for making the decree absolute, but the suit is not at an end, it is still pending, as we held in *Ellis* v. *Ellis* (4), and that, so far as it goes, is in favour of the application. But if the petitioner dies, has his personal representative any right to revive the suit, or to have the decree made absolute? It would be a singular thing if after the marriage has been dissolved by death there were power to declare it at an end on another ground. The decree nisi does

(1) Law Rep. 3 Ch. 220.
(2) 24 Ch. D. 439
(3) 4 C. P. D. 40.
(4) 8 P. D. 188.

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not dissolve the marriage. There is no rule of Court authorizing revivor in a case of this nature, and as regards authority there is none in support of it, the only case bearing on the question being *Grant* v. *Grant* (1), which is against revivor. Revivor was commonly practised in Chancery, and there was also a writ of revivor at common law. Now, when was there a right of revivor in Chancery? When the plaintiff was seeking to enforce a right which on his death would vest in his heir-at-law or his legal personal representative, then on his death the heir-at-law or personal representative could revive the suit. If he had died before the suit the heir or personal representative could have sued. It is impossible that there can be any similar transmission of interest in a suit for dissolution of marriage, for after the death of one of the parties it is impossible that any proceedings should be taken to put an end to that which has already ended. Order XVII., r. 2, of the General Orders of 1883 provides that: "In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law of any party to a cause or matter, the Court or judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party," &c. This supports what I have said: that there must be a transmissible interest—if the estate or title devolves on some one as representing the original party, the action may be revived, but there must be a devolution of the estate or title. Here the object of the suit was the dissolution of the marriage, and the case does not come within the principle on which revivor rests, for there is no one on whom the estate or interest of the deceased party devolves. It is urged that the cause of action continues, and it is true that the adultery is not done away with, but is there now any person who has any right in respect of it? In cases falling within the rule actio personalis moritur cum personâ, the wrong remains, but after the death of the person injured there is no one who can complain of it or revive proceedings which had been commenced in respect of it. Then it is urged that we ought to look upon divorce proceedings as affecting the husband's personal estate, and that on that

(1) 2 Sw. & T. 522.

ground his personal representative has a locus standi. The case of *Baker* v. *Baker* (1) was referred to in support of that contention. In that case the husband was a lunatic, and the Lords Justices authorized the committee to present a petition for the dissolution of the marriage on the ground of the wife's adultery. It appears that the committee presented the petition in his own name as well as in that of the lunatic. That, in my opinion, was wrong, for all that we could do was to authorize him to present it in the name and on behalf of the lunatic. Doubts were entertained whether divorce proceedings could be maintained pending a lunacy, and it was held that they could. All that was decided in that case was that the proceedings were not criminal but civil. What the Lords Justices had to consider was whether it was likely that the husband, if sane, would have condoned the offence, and it was a matter of discretion whether they would sanction the proceedings. There is nothing in the case involving a decision that there was any right which would pass to a personal representative. That the proceedings were not criminal in their nature does not involve any such conclusion, for there are many civil rights of action which do not pass to a personal representative.

Then we were referred to a rule of the Divorce Court, which provides that the application to make a decree nisi absolute shall be by writing signed by the solicitor of the petitioner and filed in the registry with an affidavit that there has been no intervention. That rule, in my opinion, only settles how the application is to be made, it does not affect the right to have the decree made absolute, but only the mode of applying to have it made absolute. It is said that there ought to be liberty to have the decree made absolute because the making it absolute affects rights of property. It may do so in many cases, as, for instance, by enabling children to get a settlement altered. The object of the suit, however, is not to alter rights of property, though it may have that effect, as by depriving a woman of a legacy given to her by the description of the husband's widow. Such a result, however, is only incidental; it is not the object of the suit, but results incidentally from the putting an end to the marriage.

(1) 5 P. D. 142; 6 P. D. 12.

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It is contended that *Ling* v. *Ling* (1) shews that the suit is to considered as continuing though the petitioner is dead, and that as the suit is continuing an application to make the decree absolute ought to be allowed. But that case does not shew this. The Act gave a right which did not exist till the decree had been made absolute; when once it had been made absolute the right arose. It has been the practice to intitule in the suit any application to enforce such right, and the practice is proper. Still, such an application is not really a step in the suit, but an application under a statutory power given when the decree had become absolute. Here a dissolution of the marriage cannot be decreed, for it has already been dissolved by death, yet the applicant wishes to obtain a decree, in order to secure a collateral advantage which would have been obtained if the marriage had been dissolved in the husband's lifetime. I am of opinion that the litigation cannot be continued by revivor or otherwise. I should mention Order XVII., r. 1, to which reference has been made. It provides that there shall be no abatement by the death of either party between the verdict and the judgment. That only inserted a provision which had been enacted by 17 Car. 2, c. 8, with respect to certain actions. These rules do not apply to proceedings in the Divorce Court, and we cannot hold that the suit continues. The appeal must be dismissed with costs.

BOWEN, L.J. A man can no more be divorced after his death than he can after his death be married or sentenced to death. Marriage is a union of husband and wife for their joint lives unless it be dissolved sooner, and the Court cannot dissolve a union which has already been determined. An Act of Parliament might indeed give the Court power to pronounce after the death of one of the parties a decree declaring the marriage dissolved from a certain past date, but has the Act done so? I think not. The Act of 1857 (20 & 21 Vict. c. 85), s. 31, enabled the Court to pronounce a decree declaring the marriage to be dissolved. Now, under 23 & 24 Vict. c. 144, s. 7, a decree nisi must precede the decree absolute, but though the decree is thus split

(1) 4 Sw. & T. 99.

into two parts its effect is the same, it is a decree dissolving the marriage. The appellant's counsel to escape from this difficulty tried to shew that the parties after a decree nisi stood in a peculiar relation. It is difficult to understand in what position they considered them to be, they seemed to think that the marriage was in a sort of suspended existence, and that the parties were neither married nor divorced, but were in such a peculiar relation that in some case, the name of which was not mentioned, it was held that intercourse between them in the interval might constitute adultery. I do not know what the case may be (1), but the idea seems to me worthy of Tristram Shandy. Some observations have been made, one by Lord Cairns, to the effect that the lis comes to an end on the pronouncing of the decree nisi, but in *Norman* v. *Villars* (2) the subject was fully gone into, and it was settled that a decree nisi effects no change in the status of the wife. If a decree nisi is made, and the husband dies before it is made absolute, he dies while he is still at law a husband, and his wife becomes his widow. After this, how can a decree be made which would displace a dissolution of the marriage by death, and untie a knot that no longer exists. How can a woman, once a widow, be converted into a *divorcée*, unless there is some enactment enabling the Court to make such a retrospective order?

The appellant's counsel tried to shew that the lis still continues, and they referred to the 22 & 23 Vict c. 61, s. 5, which enables the Court after a final decree to inquire into settlements and deal with the settled property. But to assume that the lis still exists because the legislature has given this power is begging the question, for it is consistent with the language of the enactment to hold it to mean that even though the suit is at an end the Court shall have power to vary settlements, and that seems to me to be the true view. The legislature is giving, over and above relief in the suit, a relief outside the suit—a relief which is the creature of the statute.

It is said that this divorce proceeding affects the personal estate of the husband, and that therefore his executor has an interest in it. No doubt it may affect his personal property, every change of

(1) *Laxton* v. *Laxton*, 30 L. J. (P. M. & A.) 208. (2) 2 Ex.D. 359.

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status may affect personal property, but that is only consequential. The object of a suit for dissolution of a marriage is not to affect property but to change the status, and it cannot be looked upon as a suit relating purely to property.

The appellants referred to *Baker* v. *Baker* (1), where it appears that the Lords Justices gave leave to a committee to take proceedings for dissolution of marriage on behalf of a lunatic, and they relied on this as shewing that other persons than a husband and wife may carry on divorce proceedings. But that case was entirely different from a proceeding by an executor. It was a proceeding to dissolve an existing marriage, and as the lunatic could not himself take proceedings it was reasonable to allow them to be taken in his name and on his behalf by his committee, but how can an executor ask to dissolve a marriage which no longer exists? An executor does not act for a dead man or in his name, but for the estate of the dead man. It is contrary to the idea of a divorce that it should be sought after the death of one of the parties.

In order to prevent waste of time arising from the common law doctrine of abatement it was no doubt enacted by 17 Car. 2, c. 8, that in all actions, real, personal, or mixed, the death of either party between the verdict and the judgment should not thereafter be alleged for error, provided the judgment be entered within two terms after the verdict. But that does not apply in the present case, which comes within the principle that every personal action dies with the person unless some statute revives it. Revivor, as Cotton, L.J., has explained, goes on the principle that there is a continuing interest which devolves upon some one, but here the object of the suit is gone. The legislature might have authorized the continuance of divorce proceedings for some collateral purposes, though their main object was gone, but it has not done so. The case appears to me to be clear on principle, and if authority were wanted *Grant* v. *Grant* (2) is enough to shew that the appeal must fail.

FRY, L.J. I am of the same opinion and feel no doubt on the case. The only decree that could be asked for would be that the

(1) 5 P. D. 142. (2) 2 Sw. & T. 522.

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marriage should be dissolved, or that it should be deemed to have been dissolved from the date of the decree nisi. Neither alternative is possible. As regards the first, no power can dissolve a marriage which has been already dissolved by the act of God. As regards the second, the Court cannot pronounce a decree declaring that the marriage was dissolved at an earlier date, because the statute gives it no such power, but only authorizes it to pronounce a decree "declaring such marriage to be dissolved." For these short reasons I agree that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Hasties & Crawfurd.*
Solicitors for respondent: *Lewis & Lewis.*

H. C. J.

HARDING *v.* HARDING.

July 3.

Judicial Separation—Neglect to comply with a Decree of Restitution—47 & 48 *Vict. c.* 68, *s.* 5.

Where a husband had refused to comply with a decree ordering him to resume cohabitation within fourteen days of the service thereof,—the Court, under the 5th section of the Matrimonial Causes Act of 1884, granted a decree of judicial separation, although the period of two years had not elapsed.

THIS was a suit by the wife praying for a judicial separation on the ground that her husband had not obeyed a decree of the Court for restitution of conjugal rights.

The respondent left his wife on the 4th of March, 1885, having written on the same day a letter to her father in which he declared his intention to cease cohabitation from that date.

On the 21st of May, 1885, the petitioner filed a petition praying for restitution of conjugal rights; and on the 3rd of November, before the suit came on for hearing, the respondent's solicitor wrote, in a letter to the petitioner's solicitors, "there will be no occasion to call witnesses to prove that Mr. Harding declines to live with his wife, as I am instructed to say that when he goes into the box he will admit it."

The suit was heard on the 14th of December, 1885, the respondent being present at the hearing, when a decree for restitution

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of conjugal rights was pronounced and the respondent was ordered to resume cohabitation with his wife within fourteen days after the service of the decree and order. The service was effected on the 18th of February, 1886, and the respondent not having resumed cohabitation, a suit for judicial separation was commenced under the provisions of s. 5 (1) of the Matrimonial Causes Act of 1884 (47 & 48 Vict. c. 68). The petition was served on the respondent on the 25th of March, 1886, and on the 27th of March he wrote a letter to the petitioner, in which were the following passages: "As to your position, you are a married woman whose husband refuses to live with you—separation from me have you not already." "I do not think you are afraid of my returning to you—you need not be." "Your husband prefers poverty and living without you, for which there must be some strong reason." On the 28th of May the respondent's solicitor wrote a letter in which he said: "Seeing that Mr. Howard (the petitioner's father) has ruined him he feels it only just and right that he should share in the benefits which are bestowed on his wife and children, and that it is not right that he should be compelled through the acts of Mr. Howard to live in a small lodging, while his wife and children are living in the lap of luxury—a condition which he is most desirous of sharing with them."

The suit was heard before the President without a jury on the 3rd of July, when a clerk from the office of the petitioner's solicitor who served the petition on the respondent stated that he said he did not mean to live with his wife, and asked for the address of his wife, which he did not give him. The reason assigned for this was that the respondent had inserted advertisements in the newspapers published in the neighbourhood of his wife's residence, intimating that he would not be answerable for her debts.

The petitioner was also examined, and stated that on the 9th

(1) The material portion of the section is as follows: "If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced, although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights.

of June her husband visited her at her father's house and spoke to her in a friendly manner, but was turned out of the house by her father.

Inderwick, Q.C. (*Bargrave Deane* with him), for the petitioner, submitted that as an offer to return to cohabitation after the two years desertion was no answer to a petition for judicial separation (*Cargill* v. *Cargill* (1) and *Basing* v. *Basing* (2)), so by analogy it would not bar the right to a judicial separation under this Act.

Middleton, for the respondent.

THE PRESIDENT, after reviewing the facts, said: If I could come to the conclusion that the respondent had failed to comply with the order of restitution because he had not the means of doing so, and because he did not know where his wife was, I would not make a decree of judicial separation. But nobody can be expected to believe after the letters which have been read that the respondent ever sincerely desired to resume cohabitation with his wife. I am satisfied that the respondent intentionally disobeyed the order of the Court, and I therefore pronounce a decree of judicial separation.

Solicitors for petitioner: *Nash & Field.*
Solicitor for respondent: *Bartlett.*

(1) 27 L. J. (P. & M.) 69. (2) 33 L. J. (P. M. & A.) 150.

W. L.

1886
June 3.

[IN THE COURT OF APPEAL.]

THE ANNOT LYLE.

Collision—Ship at Anchor—Burden of Proof—Practice—Appeal to House of Lords—Stay of Execution.

In an action founded upon a collision between a vessel at anchor and one in motion, the burden of proof is upon the owners of the latter to prove that the collision was not occasioned by any negligence on their part.

When an appeal is brought from the Court of Appeal to the House of Lords in an Admiralty action, in which bail has been given by the parties, an application by the appellant to stay execution pending the appeal will not be granted, unless special circumstances are shewn by affidavit.

Appeal from a decision of Butt, J., dismissing the action and giving judgment for the defendants. The action was brought by the owners of the *Nenuphar* against the owners of the *Annot Lyle* in respect of a collision in the Downs between those vessels, whereby the *Nenuphar* was damaged. The *Nenuphar* was at anchor at the time of the collision, and Butt, J., was not satisfied that there had been negligence on the part of the defendants, and therefore dismissed the action. The plaintiffs appealed. The case is reported only with regard to the decision as to the burden of proof where a collision takes place between a vessel in motion and one at anchor.

Bucknill, Q.C., and *Hannen*, for the plaintiffs.
Sir W. Phillimore, and *Kennedy*, for the defendants.

Lord Herschell, L.C. In this case the *Nenuphar* was at anchor in the Downs when the collision, the subject of this action, occurred, no blame can therefore be attributed to her. Under these circumstances the burden is on the defendants to discharge themselves from the liability which arises from the fact that the *Annot Lyle* came into collision with and damaged a ship at anchor. The cause of the collision in such a case may be an inevitable accident not arising from negligent navigation, but unless the defendants can prove this, the law is clear, and they are liable for the damage caused by their ship. I advert to this point

because, though the arguments addressed to the Court to-day were in regard to the conduct of the *Annot Lyle*, there are expressions in the judgment of the learned judge, which seem to indicate that the plaintiffs must prove that those on board the *Annot Lyle* were negligent, and that unless they do so the defendants are entitled to judgment. I do not think that this can have been the intention of the learned judge, but the expressions are somewhat unguarded in their form, and therefore it is desirable that the Court should not allow any misapprehension to exist in regard to this point. [The Lord Chancellor then dealt with the facts of the case and held that the *Annot Lyle* was alone to blame.]

LORD ESHER, M.R., and FRY, L.J., concurred.

Appeal allowed.

June 9. *Sir W. Phillimore*, for the defendants, moved for a stay of execution pending an appeal to the House of Lords. No affidavits were filed in support of the application.

Sir W. Phillimore. There are no special circumstances in this case which entitle the defendants to have a stay of execution granted, but in Admiralty actions when bail has been given, and the fruits of the litigation are thus secured to the plaintiffs, it is only reasonable that in the absence of a special reason to the contrary the defendants should not be obliged to pay over the damages, before their appeal has been heard by the House of Lords. A similar application was granted in *The Khedive*. (1)

Bucknill, Q.C., for the plaintiffs, was not called upon.

LORD ESHER, M.R. We are invited to lay down a general rule applicable to appeals in Admiralty cases from this Court, differing from that which is in force in regard to other cases. It was argued that we ought to do this because bail has been given by the defendants, and interest is payable on the amount of the damages. Although this may be so, yet the respondents would not receive either the principal or the interest till the decision of the appeal. I see no sufficient reason why they should thus be kept out of their money. It was said that it was the practice

(1) 5 P. D. 1.

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of the Privy Council to stay execution in similar cases, but that practice must be taken to have been known to the legislature, when it transferred the jurisdiction of that tribunal in Admiralty appeals to this Court, and made such appeals a branch of the ordinary business of this Court, and subject to the same rule in this respect as all other business, viz., that an appeal shall be no stay of proceedings except the Court may so order. We are asked to depart from that rule, although it is admitted that there are no special circumstances in this case which afford a ground for so doing. If in any particular case there is a danger of the appellants not being repaid if their appeal is successful, either because the respondents are foreigners, or for other good reason, this must be shewn by affidavit, and may form a ground for ordering a stay. To grant the present application would, in the absence of special circumstances, clearly be to act contrary to the provisions and intention of the Rules of Court.

BOWEN, L.J. I am of the same opinion. An unsuccessful litigant comes to ask us to deprive a successful one of the fruits of his success, until a further appeal is determined. No affidavit has been made on behalf of the applicants, and we must therefore assume that if the money is paid over to the respondents, and the appeal is successful, the appellants will be able to get it back. There is no reason, in my opinion, why in Admiralty cases we should make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds, to which primâ facie he is entitled, for a long time because they are secured by the bail bond. We cannot assume that it is a matter of small imimportance to a successful party to go without his damages for a long time. The rule which this Court laid down in *Barker* v. *Lavery* (1) applies to Admiralty cases as much as to the others which come before the Court, for no special distinction between the different classes of cases has been drawn in the Rules of Court.

FRY, L.J. I am also of opinion that in the absence of special circumstances the application must be refused. *The Khedive* (2)

(1) 14 Q. B. D. 769. (2) 5 P. D. 1.

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was cited to us as an authority in favour of the application, but in my opinion the point raised before us to-day was neither decided nor discussed in that case.

Application refused.

Solicitors for appellants: *Pritchard & Sons.*
Solicitors for respondents: *T. Cooper & Co.*

E. S. R.

[IN THE COURT OF APPEAL.]

June 4.

THE LEVERINGTON.

Collision—Regulations for Preventing Collisions at Sea, Arts. 16, 21, 22—*Cardiff Docks Entrance.*

A collision occurred at the junction of the main channel leading to Cardiff Docks and the channel to the Roath Basin, between a steamer going up the former and another coming down the latter:—

Held, that the place of the collision was a "narrow channel" within art. 21 of the Regulations for Preventing Collisions at Sea, and that arts. 16 and 22 were also applicable, there being no special or local rules to supersede the general rules of navigation.

APPEAL from a judgment of Butt, J., whereby he pronounced the *Rapid* alone to blame for a collision between that vessel and the *Leverington*. The collision occurred on the 3rd of September, 1884, about noon, in the entrance channel to the Cardiff Docks. The plaintiffs' steamship, the *Rapid*, was coming down the channel from the Roath Basin heading south-west. The defendants' steamship, the *Leverington*, was coming up the main channel or "drain" heading north-north-east. As the *Rapid* approached the junction of the two channels she ported two or three points, in order to cross the bows of the *Leverington*, and to get on to the starboard side of the main channel. The *Leverington* observed the *Rapid* coming down the side channel bearing three or four points on the starboard bow, and about 300 yards distant. She was going about one and a half knots an hour, and her engines were then set on slowly ahead so as to allow the *Rapid* to pass under her stern. As soon, however, as the *Rapid* was seen to be about to try to

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THE LEVERINGTON.

cross her bows, the engines of the *Leverington* were reversed full speed, but the *Rapid* struck the stem of the *Leverington* with her port bow. Butt, J., held that the *Rapid* was to blame for wrongly attempting to cross the bows of the *Leverington*.

The plaintiffs appealed.

Sir W. Phillimore, and *Baden Powell*, for the plaintiffs. This collision occurred in a narrow channel, and the *Rapid* was keeping to the starboard side in accordance with art. 21 (1) of the Regulations for Preventing Collisions at Sea, which clearly apply to this place. Therefore she is not to blame for this collision. Moreover, by trying to get over to the starboard side she was in fact keeping her course, and thus complying with art. 22. (2)

Kennedy, Q.C., and *Barnes*, for the defendants. The *Rapid* is alone to blame. Assuming that the Regulations apply to this channel, then art. 16 (3) applies, and the *Leverington* was a crossing ship, but it was the correlative duty of the *Rapid* to keep her course, which she did not do, and is therefore to blame for infringing art. 22.

LORD HERSCHELL, L.C. (after stating the facts, proceeded) :— It has been argued on behalf of the appellants that the *Rapid* was in a narrow channel, and that according to art. 21 it was her duty to keep on the starboard side of the channel. This is no doubt a narrow channel, and one to which that article applies. But then it must be remembered that the *Leverington* had also to keep on her starboard side of the channel, and was in fact on that side. Now the *Rapid* undoubtedly ported before the collision, and we are advised that, but for this porting, the *Rapid* and the *Leverington* might both have continued on their courses with safety. That is, if the *Rapid* had gone on without porting, the *Leverington* by keeping her course would have got out of the

(1) Art. 21 : "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship."

(2) Art. 22 : "When by the above rules one of two ships is to keep out of the way, the other shall keep her course."

(3) Art. 16 : "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

way of the *Rapid*. We are further of opinion that art. 16 is applicable to the present case. Though these are narrow channels, still the general rules of navigation apply, so far as practicable in such places, no other special rules being provided, as is the case in some rivers. That being so, and these vessels being crossing ships, it was the duty of the *Leverington*, which had the *Rapid* on her starboard side, to keep out of the way of the latter. The manœuvre which she executed of keeping her course and going on faster was a compliance with that rule, and no collision would have occurred had the *Rapid* obeyed art. 22 and kept her course. Therefore the *Rapid* was alone to blame for the collision, and the judgment of Butt J. must be affirmed.

LORD ESHER, M.R. These two ships were in a narrow channel, so that art. 21 was applicable. The question arises whether art. 16 was not also applicable at a particular point in these transactions. That rule must clearly apply in a narrow channel if there are no special rules applicable to it. Instances might easily be given where a smaller river joins a larger, as the Medway joins the Thames, where vessels would be constantly crossing, and where the crossing rule would apply. It is well that we should clearly lay this down, so that in the future when vessels are at the point which was the place of the present collision, and at similar places, there may be no doubt as to their respective duties. Here the *Leverington* was bound to keep out of the way of the *Rapid*, and the *Rapid* to keep her course; the latter ported and broke art. 22, while the *Leverington* was doing what was right in order to keep out of the way of the other ship. Therefore the *Rapid* is alone to blame for the collision.

FRY, L.J. I am of the same opinion. I think that art. 16 applies in narrow channels, and that it would be unwise and incorrect to hold that it does not apply in such places.

Appeal dismissed.

Solicitors for plaintiffs: *Ingledew, Ince, & Colt.*
Solicitors for defendants: *T. Cooper & Co.*

E. S. R.

1886

May 11;
July 13.

THE RINGDOVE.

Master of Ship—Disbursements—Maritime Lien—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 10.

Under the Admiralty Court Act, 1861, s. 6, the master of a ship has a maritime lien on it for disbursements, and his claim has priority over that of a purchaser.

The Mary Ann (1 A. & E. 8) followed.

MOTION in objection to the registrar's report. The action was for wages and disbursements by the late master of the *Ringdove*, and the registrar found that a sum was due to the master in respect both of wages and disbursements. The writ in the action was issued on the 17th of December, and the writ and warrant of arrest were both served on the 21st of December. On the 17th of December the *Ringdove* was transferred by bill of sale to the West of England Shipping Company, and the transfer was registered on the 22nd of December. The grounds on which the defendants objected to the finding of the registrar were that there was no maritime lien for disbursements, and that the right of the plaintiff against the ship did not begin till the institution of the action; that the institution of the suit was the service of the writ, and therefore that the defendants' claim had priority over that of the plaintiff.

Aspinall, for the defendants. There is no maritime lien for the master's disbursements. His right to claim for disbursements against the ship arises from the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 10. (1) There have been decisions to the effect that a master has a maritime lien for disbursements under this section, but *The Heinrich Bjorn* (2) has decided that s. 5 of the same Act, in which the words are the same as s. 10, and 3 & 4 Vict. s. 65, s. 6, which relate to necessaries, do not give a

(1) Sect. 10. "The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship."

(2) 10 P. D. 44; 11 App. Cas. 270.

maritime lien, but only a right to arrest the ship, and that decision governs the present case.

If, then, there is no maritime lien the plaintiff has no right against the ship "till action brought," that is, till the institution of the suit. The institution of the suit is the service of the writ on the vessel. Under the old practice the warrant was the only instrument served, and this was the institution of the suit: *The Pacific* (1); *The Troubadour* (2); *The Two Ellens.* (3) An analogous case is that of a garnishee order, which must be served before a judgment creditor has any priority: *In re Stanhope Silkstone Colliery Co.* (4); *Hamer* v. *Giles.* (5)

Further the registration of the bill of sale is not the commencement of the purchaser's title. It commences from the making of the instrument of transfer: *Stapleton* v. *Haymen* (6); *The Two Ellens.* (3)

Sir W. Phillimore (*Raikes* with him), for the plaintiff. The decision in *The Heinrich Bjorn* (7) proceeded upon the fact that the authorities in favour of a maritime lien for necessaries were not uniform. The authorities in favour of a maritime lien for the disbursements by the master are conclusive. *The Feronia* (8); *The Jenny Lind* (9); *The Mary Anne* (10); *The Fairport* (11); *The Heinrich Bjorn* (7) is therefore no authority against the plaintiff's claim. Secondly, assuming that there is no maritime lien, the plaintiff is still entitled to recover, because his claim has priority over that of the defendants. The suit was instituted before the transfer to the company, for institution must be taken in its strict sense, namely, the commencement of the proceedings, and this commencement is the issuing of the writ.

Aspinall, in reply.

Cur. adv. vult.

July 13. THE PRESIDENT. This is an action in rem by the master of the *Ringdove* for wages and disbursements. It is alleged

(1) Br. & L. 243.
(2) 1 A. & E. 302.
(3) Law Rep. 4 P. C. 161.
(4) 11 Ch. D. 160.
(5) 11 Ch. D. 942.
(6) 2 H. & C. 918.
(7) 10 P. D. 44.
(8) 2 A. & E. 65.
(9) 3 A. & E. 529.
(10) 1 A. & E. 8.
(11) 10 P. D. 13.

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that on the day on which the action was commenced a bill of sale of the ship was executed by the then owners to a company called the West of England Shipping Company, Limited. The bona fides of this transfer is disputed by the plaintiff, and it would be necessary before judgment could be pronounced for the company that their claim should be investigated before the registrar; but for the present purpose the validity of the transfer is assumed. So the question now to be determined is whether the master of a ship has a lien on the vessel for disbursements, which is to be preferred to the claim of a purchaser.

This point was distinctly raised in the case of *The Mary Ann* (1) in 1865, when Dr. Lushington held that the master's claim for disbursements was to be preferred to that of a mortgagee. This decision, in which the learned judge went very carefully into the history of the law of master's lien, has been acted upon ever since. It was followed by Sir R. Phillimore in *The Feronia* (2) and in *The Fairport* (3), and the law as then declared was recognised by James, L.J., and the present Master of the Rolls in the case of *In re Rio Grande Do Sul Co., Limited.* (4) But it is said that *The Mary Ann* (1) has been overruled by *The Heinrich Bjorn* (5); that case, however, related only to necessaries, and decided that 3 & 4 Vict. c. 65, s. 6, did not confer a maritime lien for necessaries supplied to a foreign ship. *The Mary Ann* (1) related to master's wages and disbursements, which are governed by the Merchant Shipping Act of 1854, s. 191, and the Admiralty Court Act, 1861, s. 10. Dr. Lushington there clearly laid down the principles which have been confirmed by the Court of Appeal in *The Heinrich Bjorn* (5), namely, (1) that a maritime lien springs into existence when the circumstances give birth to it, as damage, salvage, wages, &c.; (2) that the mere conferring of jurisdiction on the Admiralty Court in a particular matter does not carry with it a maritime lien. But Dr. Lushington came to the conclusion that "the master claiming for disbursements was to be preferred to the mortgagee, because before the Act of 1861 his claim for disbursements was entitled

(1) 1 Ad. & Ecc. 8.
(2) 2 Ad. & Ecc. 65.
(3) 8 P. D. 48.
(4) 5 Ch. D. 282.
(5) 10 P. D. 44.

to a similar preference in the only case where the Court could take cognizance of such disbursements, namely, in the case of a set-off."

I cannot say that this reasoning is altogether satisfactory to my mind. But finding, as I do, that the case of *The Mary Ann* (1) has been followed by my learned predecessor, and has been sanctioned by the Court of Appeal, I do not feel at liberty to disregard its authority. It has now been assumed for more than twenty years that a master has a lien for disbursements; innumerable accounts have been settled on that footing, and many existing liabilities for disbursements have been incurred by masters on the faith of their having a lien for them. I think that it would be a misfortune if masters were deprived of the security they now possess, and I must decline the responsibility of altering to their detriment the law as it has been so long administered. My judgment will be for the plaintiff with costs.

Solicitors for plaintiff: *Thomas & Hicks.*

Solicitors for defendants: *Ingledew, Ince, & Colt,* agents for *P. T. Pearce,* Plymouth.

(1) 1 A. & E. 8.

E. S. R.

1886
Aug. 3.

THE NAPLES.

Costs—Inevitable Accident—Admission in Pleadings.

The plaintiffs in an action for damage by collision admitted on the pleadings that the collision was the result of an inevitable accident:—

Held, that the defendants were entitled to judgment with costs.

Held also, that unless there are special circumstances to induce the Court to depart from this rule, costs will be given against the plaintiffs in an action of damage, whenever the defendants prove that the collision is the result of an inevitable accident.

MOTION for judgment by the defendants, the owners of the *Naples*, in an action of damage by collision. The defendants by their defence alleged that the collision was not caused by their negligence, and that it was the result of an inevitable accident. The plaintiffs in the reply admitted that the collision was the result of such an accident. On this admission the defendants applied for judgment.

Aspinall, for the motion. The defendants are entitled to judgment with costs.

Sims Williams, for the plaintiffs. It is admitted that the defendants are entitled to judgment, but it is submitted that, in accordance with the general rule of practice, when a collision is found to be the result of an inevitable accident each side should pay their own costs: *The Marpesia*. (1) This rule was departed from in *The Swansea* (2), but it has since been reverted to: *The Buckhurst* (3). Assuming the Court will follow *The Swansea* (2), then there are special circumstances in this case which shew that it was reasonable to bring the action. [He then read a passage in an affidavit to the effect that the *Naples* broke from her mooring in a hurricane in the Suez Canal, and argued that this shewed a primâ facie case of the moorings being insufficient, so that there was reasonable ground for bringing the action.]

BUTT, J. I am of opinion that in this case there must be judgment for the defendants with costs. I have been asked by

(1) Law Rep. 4 P. C. 212. (2) 4 P. D. 115.
(3) 6 P. D. 152.

counsel for the plaintiffs not to give costs, and this request has been based on certain authorities which have been cited. I consider that they do not apply to this case, for the rule that each side shall pay their own costs when a collision is the result of an inevitable accident has never been applied, except when there has been a judgment of the Court on a finding of fact. But in the case of *The Swansea* (1) the Court of Appeal laid it down that the practice in such cases should be the same in all Divisions of the High Court. With that decision—if I may say so—I entirely agree. I think it would be altogether wrong that this Court should deal with these questions differently to other Divisions. No doubt under special circumstances it may be reasonable to depart from this general rule. Some of the circumstances of this case have been disclosed in the affidavit which has been read, and it seems there was a hurricane blowing at the time of the collision. I should have thought that this would of itself be a notice to the plaintiffs that the collision was probably not occasioned by any negligence on the part of the defendants. Therefore I am of opinion that the rule laid down in *The Swansea* (1) should be applied in the present case.

Solicitors for plaintiffs: *Ingledew, Ince, & Colt.*
Solicitors for defendants: *T. Cooper & Co.*

(1) 4 P. D. 115.

E. S. R.

1886

July 27.

IN THE GOODS OF HENLEY.

Administration—Property Abroad—Foreign Court—Amended Grant.

An intestate died leaving personal estate to the amount of 273*l.* in this country, and 6100*l.* in the Italian rentes. The Italian Court refused to grant the authority required to deal with the property within its jurisdiction, on the ground that the letters of administration granted by the Court of Probate here were on the face of them limited to the smaller amount in this country, and that this Court, if it had been made aware of the full value of the estate, would have required greater security for its administration. The Court allowed the letters of administration to be amended—the Board of Inland Revenue having signified its consent to accept the succession duty on the Italian rentes as probate duty—so as to state on the face of them that the larger sum was also included.

OLIVIA LETITIA HENLEY, deceased, died at Castellamare, near Naples, in the kingdom of Italy, a spinster and intestate, being domiciled in England at the time of her death.

On the 18th of February, 1885, letters of administration of the personal estate and effects of the deceased were granted to Charles Henry Walsh, her nephew. The personal estate in England was of the value of 273*l.* 6*s.* 6*d.*, but she was also possessed of a sum of 6100*l.* in the Italian Inscribed Rentes.

The letters of administration were forwarded to Her Majesty's consul at Rome, with a power of attorney to sell the rentes, but the Italian Court of Appeal at Rome refused to grant the necessary authority, on the ground that the letters of administration granted by the Court of Probate in London were limited only to an estate of the value of 273*l.* 6*s.* 6*d.*, and that if the full value of the estate had been represented to this Court it would have required greater security for the due administration thereof.

On the 23rd of June, 1885, this Court ordered the letters of administration to be amended by inserting the words, "and since transmitted to this country;" but the Italian Court held this to be insufficient, and on the 23rd of August, 1885, it pronounced a decree refusing the application.

Application was made to the Board of Inland Revenue that the amount of succession duty payable on the Italian rentes might be

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IN THE GOODS OF HENLEY.

accepted as probate duty, and the Board acceded to the application.

Searle now moved that the letters of administration be further amended, so that it might appear on the face of them that the grant included the larger sum.

THE PRESIDENT. I have always acted on this rule, that the form of the document should as far as possible include the whole state of facts. Although I may regret that the Italian Court has raised this objection, I can see no reason myself why the grant should not be altered so as to make it appear on the face of it that it includes this larger sum.

Grant ordered to be amended so as to state thereon that the gross value of the estate amounted to 6373*l.* 6*s.* 6*d.*, of which sum 273*l.* 6*s.* 6*d.* had been remitted to this country, but that the residue of the said estate consisted of 7800 5 per cent. lire in the Italian Inscribed Rentes, of the present value of 6100*l.* or thereabouts.

Solicitors: *Blount, Lynch, & Petre.*

W. L.

1886
Jnly 7.

SCOTT *v.* HER MAJESTY'S ATTORNEY GENERAL.

Foreign Law—Husband and Wife—Marriage—Presumption of Domicil—Irish Marriage dissolved by a Colonial Court—Roman-Dutch Law—Subsequent Marriage in England — Validity — Legitimacy Declaration Act, 1858, (21 & 22 *Vict. c.* 93).

Considered. STARKOWSKI *v.* ATT.-GEN. [1952] P. 135

A. and B., both having an Irish domicil, were lawfully married in Ireland, and resided in Ireland for a year after their marriage. They subsequently went to an English colony, where the husband was engaged in various pursuits, abandoned all idea of returning home, and visited England only for short periods and for temporary purposes. In the fifth year of cohabitation B. committed adultery with S., whose domicil was English, and in a suit instituted by A. in the colonial court—in which all the parties were represented—a decree was pronounced dissolving the marriage.

B. and S. shortly afterwards returned to England, where they went through the form of a marriage according to law.

Held, first, that it must be taken that A. was domiciled in the colony and that the divorce was valid; secondly, that the marriage between B. and S. was valid, for although the law prevailing in the colony prohibited the re-marriage of a guilty party as long as the innocent party remained unmarried, yet as the colonial divorce operated to annul the existing marriage and to restore the parties to the position of unmarried persons, they were free to remove from the jurisdiction and to contract a fresh marriage according to the law of this country.

THIS was a petition under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), in which the petitioner, Carteret Cunningham Scott, prayed for a decree of the validity of his marriage with Anna Deborah Scott, formerly Anna Deborah Peacocke.

Anna Deborah Peacocke, then Anna Deborah Low, was lawfully married on the 6th of February, 1878, to Septimus Peacocke, in the parish of Kilmuckridge, in the county of Wexford, according to the rites of the Church of Ireland, both being Irish Protestants and having an Irish domicil of origin. After their marriage they resided in the county of Tipperary, and about the year 1880 they went to Cape Town, where Mr. Peacocke was employed for six months in the commissariat. Subsequently he went to Natal, where he was employed in farming and hotel-keeping for some months. At the end of 1880 they came to England and remained here for two months, but returned to Natal,

where Mr. Peacocke was again employed in the commissariat; and after a second visit to England, when he appears to have obtained a loan of 500*l.* from his brother-in-law, he took a brick-field in Natal which he worked until some time in the year 1883. He and his wife then came again to this country, where they remained for some months paying visits to friends, and in February, 1884, they sailed for Australia.

On the voyage out they made the acquaintance of Mr. Scott, the petitioner, and on reaching Melbourne Mr. Peacocke and Mr. Scott entered into a partnership agreement, dated the 22nd of May, 1884, for carrying on an ostrich farm in the Cape Colony. This partnership by the terms of it was to be for life.

After spending a short time in Australia, Mr. and Mrs. Peacocke and Mr. Scott left Melbourne together for Port Elizabeth via Mauritius, where they stayed a month, and from there they all three sailed for Port Elizabeth via Natal. At Natal Mr. Scott eloped with Mrs. Peacocke and they proceeded to Port Elizabeth in the Cape Colony, where they lived together as man and wife. Mr. Peacocke followed in the next ship, and on arriving in the Cape Colony immediately commenced an action for a dissolution of his marriage in the Court of the Eastern Districts of the Cape of Good Hope. Mrs. Peacocke and Mr. Scott were both represented in these proceedings, and on the 2nd of December, 1884, the Court, sitting at Graham's Town, pronounced a decree dissolving the marriage and finding Mr. Scott liable in 500*l.* damages and costs.

On the 10th of December, 1884, Mrs. Peacocke and Mr. Scott were married at St. George's Cathedral, Cape Town, and immediately after came to England, where on the 10th of June, 1885, they went through a ceremony of marriage at the district registry office of St. George's, Hanover Square, in the county of Middlesex.

Mr. Peacocke remained in South Africa, and the last news of him was that he was in the Orange Free State. Service of the citation to see proceedings, by leave of the Court on motion, had been served on him by advertisement, and on his brother-in-law residing in Dublin, and an appearance had been entered on his behalf, but he had filed no answer, nor did he appear at the hearing.

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Mrs. Scott had also been cited to see proceedings, and entered an appearance, but she did not file an answer, nor did she appear.

The Attorney General filed an answer traversing the allegations of the petition, and praying that it be dismissed.

The case was heard before the President.

Inderwick, Q.C. (*Searle,* with him), for the petitioner.

Gore, for the Attorney General.

At the hearing Mr. Mackarness, a member of the English bar who had practised three years in the Cape Colony, deposed that the office copy of the decree of divorce pronounced by the Court at Graham's Town would be received as evidence of the divorce in the Cape Colony and in Natal, and that a decree pronounced in the Cape Colony would be recognised as valid in Natal and vice versâ. The Roman-Dutch Law was the law of the Colony, and by that law among the exceptions to persons who may contract second marriages are those who have lived in adultery, until the injured party marries another. He cited Van Leeuwen's Commentaries, p. 84, and Juta's Institutes, p. 19; and he also referred to *Daniel* v. *Daniel.* (1)

In reply to questions from the President, he stated that if the Colonial Court grants a decree dissolving an existing marriage at the suit of the husband, such decree, according to the law of the Colony, is an absolute dissolution of the marriage, and that in his opinion the law of the Cape Colony did not empower the Courts there to dissolve marriages between persons not domiciled in the Colony.

Mr. Biller, a merchant of the city of London in business relations with Mr. Peacocke, deposed that the last he heard of him was in 1885, and he had no reason to suppose that he intended to return to this country.

Mrs. Scott stated that when she and Mr. Peacocke left this country in 1880, they had no intention of returning permanently, but had only paid short visits here, and both she and Mr. Scott stated that when they returned in 1885 it was with the intention of remaining here.

(1) 3 Juta's Reports, pt. 2, p. 233.

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THE PRESIDENT. It seemed probable that this case might raise points of considerable importance, but now that all the evidence is before me I think that ground has been established on which I may grant the prayer of this petition that one or other of these marriages should be declared valid. The first question is whether Mr. Peacocke at the time of the divorce was domiciled in the colony. It is admitted that he had given up all idea of returning to Ireland, and that he only paid short visits to raise money, and so on. He entered into various enterprises, and among others into this partnership for life to carry on ostrich farming, which shews that he had no intention of returning here. He has remained in South Africa ever since the divorce, and the last we hear of him is from the Orange Free State. He instituted his proceeding for a divorce in the Colonial Court, and Mr. Mackarness has stated that the Court does not grant divorces unless the persons are domiciled within their jurisdiction. It must be presumed that the Court was satisfied that Mr. Peacocke's domicil was such as to confer jurisdiction upon it. I therefore come to the conclusion on the evidence, slight as it is, that Mr. Peacocke was domiciled in the Cape Colony. That being so, the next question which arises is, what is the effect of the personal disability which the Roman-Dutch Law fixes on the guilty party in a divorce proceeding. It is stated that the guilty wife cannot remarry while the other party remains unmarried, but Mr. Mackarness has also stated explicitly that if a decree of divorce be granted the marriage is absolutely dissolved, and both parties become unmarried persons. That being so, either of them is free to remove into any other jurisdiction. Mrs. Scott came to this country with the intention of remaining here, and she was therefore free to marry according to the law of this country.

I therefore hold that the marriage at the district registry of St. George's, Hanover Square, celebrated on the 10th of June, 1885, was a valid marriage.

Solicitors for petitioners: *Redpath & Holdsworth.*

Solicitors for the Attorney General: *Gregory, Rowcliffes, & Co.*

W. L.

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June 2.

[IN THE COURT OF APPEAL.]

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Collision—Sailing Rules—Regulations for Preventing Collisions at Sea, Arts. 11, 20.

A ship is "being overtaken" within the meaning of art. 11 when another is going faster than, and is coming nearer to her, on a course which may ultimately lead to a position of danger, and when the following ship is within the space not covered by the lights of the first ship, and is thus in a position in which these lights cannot be seen by those on board the following ship.

The light prescribed in art. 11 must be shewn within a reasonable time before the overtaking ship gets into a position of danger, and after the overtaken ship has become aware that the overtaking ship is approaching in the manner before stated.

The Franconia (2 P. D. 8) approved.

Appeal from a decision of the President, whereby he held that the steamship *Main* was alone to blame for a collision between that vessel and the barque *Kalaja*. The collision occurred in the North Atlantic Ocean about 1.30 A.M. on the 14th of April, 1885. The *Kalaja* was on an E.N.E. $\frac{1}{4}$ N. course, and the *Main* on an E. $\frac{1}{4}$ N. course. Those on the *Kalaja* perceived the white light of a steamer, which proved to be the *Main*, at what was estimated to be a distance of five miles, about three points on her port quarter. In about a quarter of an hour a green light was also seen at about the same bearing. The green light broadened to about six or seven points. When about two cables' lengths distant from the *Kalaja* the *Main* under a hard-a-port helm, came towards the *Kalaja*, struck her port quarter, and sank her. No stern light had been shewn from the *Kalaja*. The officer in charge of the *Main* saw nothing until the red light of the *Kalaja* came into view, and believing it to be a sailing ship close hauled, without waiting to ascertain if this was so, he ordered the helm to be ported, and so caused the collision.

The defendants appealed. The main ground of the appeal was that the *Kalaja* was also to blame for not shewing a stern light according to art. 11 of the Regulations for Preventing Collisions at Sea. (1)

(1) Art. 11: "A ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light."

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Sir R. E. Webster, *Q.C.*, and *Aspinall*, (*Pyke*, with them), for the defendants. The *Kalaja* was a ship about to be overtaken by another within the meaning of art. 11, and was therefore bound to comply with that article. The *Main* was an overtaking vessel within art. 20 (1), and to enable her to fulfil the duty cast on her by that article she is entitled to the guidance from the overtaken ship enjoined by art. 11. The word "overtaking" must be considered in regard both to speed and direction. A vessel is overtaking another within art. 11 when the former cannot see the lights of the latter, and is approaching her. There need not be a risk of collision in order to oblige the overtaken ship to shew a light. Art. 11 is intended to prevent a risk of collision, and so must be obeyed before there actually exists a risk. *The Franconia* (2) is an authority in favour of the defendants, and its weight is not lessened by certain expressions of the Court in *The Peckforton Castle*. (3) *The Seaton* (4) is also an authority in favour of the defendants, as it shews that a vessel which is crossing the course of another may yet be overtaking her. Therefore the *Kalaja* infringed art. 11, and even if this infringement is not shewn to be the actual cause of the collision, yet she must, under the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17, be deemed to be in fault: *The Khedive*. (5)

Sir W. Phillimore, and *Raikes*, for the plaintiffs. The *Kalaja* is not in any way to blame for this collision. Art. 11 does not apply, because she was never an overtaken ship within the meaning of that article. A ship is not overtaking another unless the former, if she goes on, would run into the latter. This would not have happened here, for the *Main* if she had proceeded in due course would have passed clear; it was the careless porting which caused the collision, and the *Kalaja* was never under the obligation to shew a light from her stern. Each article contemplates a risk of collision, and there was no risk here till the *Main* improperly ported. *The Reiher* (6) is an authority in favour of

(1) Art. 20: "Notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steamship, overtaking any other, shall keep out of the way of the overtaken ship."

(2) 2 P. D. 8.
(3) 3 P. D. 11.
(4) 9 P. D. 1.
(5) 5 App. Cas. 876.
(6) 4 Asp. M. C. 478.

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the plaintiffs. The definition of an overtaking ship in *The Franconia* (1) was questioned in *The Peckforton Castle.* (2)

Sir R. E. Webster, in reply. If *The Reiher* (3) can be regarded as a decision in favour of the plaintiffs it was wrongly decided, and this Court is not bound by it.

LORD HERSCHELL, L.C. This is an appeal from a judgment of the President, whereby he found the *Main* to be alone to blame for a collision between that vessel and the sailing ship *Kalaja.* The owners of the *Main* appealed from that decision on the grounds, first, that the *Main* was not to blame; and, secondly, that even if she were, the *Kalaja* was also to blame. As regards the first point, we think the decision of the President was right, and that the *Main* was to blame, either in porting when she did, or perhaps in not stopping and reversing sooner than she did. Then comes the more important question, whether the learned judge was right in holding that the *Kalaja* was not to blame. It is alleged on behalf of the appellants that the *Kalaja* was in fault by reason of a breach of art. 11 of the Regulations for Preventing Collisions at Sea. It has been held in *The Khedive* (4) that s. 17 of the Merchant Shipping Act, 1873, compels the Court to come to the conclusion that a vessel which has infringed the regulations is in fault; that it is unnecessary for the Court to consider whether the breach of regulations in fact contributed to the accident;—that if two vessels have come into collision, although that collision be the fault of one of them, so far as navigation is concerned, yet if it appears at the trial that the other vessel was guilty of a breach of one of these regulations, then that she must be deemed to be in fault.—By that decision we are bound, and therefore the question which we have to determine is whether there has been a breach by the *Kalaja* of art. 11. This regulation did not exist before 1880. Previous to that date several cases had arisen in which the absence of a stern light had been put forward as shewing a want of reasonable care and skill in the navigation of an overtaken vessel. But there was no formal rule on the subject. It was clearly, therefore, thought

(1) 2 P. D. 8.
(2) 3 P. D. 11.
(3) 4 Asp. M. C. 478.
(4) 5 App. Cas. 876.

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that it was inexpedient to leave it to the judgment of the person navigating the overtaken vessel whether a light should be exhibited or not. And it was considered desirable to lay an absolute obligation on the overtaken vessel to shew a light, so that the overtaking ship might be in a position to comply with art. 20 and to keep out of her way. The question therefore arises, what is the meaning of the phrase "a ship which is being overtaken by another" in art. 11? It has been contended on behalf of the defendants that a ship is being overtaken by another, within the meaning of this article, when a ship is approaching another in a position in which she is unable to see the lights of the vessel which is ahead of her, and which she is approaching. On the other hand, it has been contended for the plaintiffs that a vessel is only being overtaken when the course of the overtaking ship is such that if it be left unchanged a collision will ensue. The latter is, I think, certainly too narrow a construction; it would be a dangerous construction to put not only on this article, but also on art. 20. Because if that construction were put upon it, a vessel which was being navigated in a perfectly prudent manner may nevertheless inevitably come into collision with a vessel ahead of her. For the obligation to shew a light would never arise until the two vessels were so close, and the collision so imminent, that it could not be prevented even where notice of the vessel which was being approached was given. To enable us to put a right construction on art. 11 we must look to its purpose and object. The legislature having laid down a rule that the overtaking vessel must keep out of the way of the vessel which she is overtaking, it must be taken to have contemplated that the vessel whose duty it is to keep out of the way of the other could not be in a position to discharge that duty unless she were made acquainted with the position of the other vessel. Until she sees a light from that vessel she is ignorant that there is any other ship there at all, and she is at liberty to navigate the ocean as she pleases, and to manœuvre as she pleases; and unless she receives notice that a vessel is ahead of her there is nothing to guide her in so doing. Now it appears to me that the object of this rule is, that where a vessel was able to see, and ought to have seen, that another vessel was approaching her, going faster

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than she was, coming nearer to her, and being on such a course as might ultimately lead to a position of danger, and yet not being in a position to see the lights of the vessel ahead of her, that then the obligation is on the vessel being overtaken in this sense to shew from her stern a white light or a flare-up.

But there is a further question as to the time at which the obligation to shew the light arises. It does not arise till the vessel which is being overtaken has had an opportunity of seeing that the vessel which is overtaking her is a vessel coming nearer to her, and that she is approaching on such a course that she cannot see the lights of the overtaken ship. When the overtaking vessel is seen to be thus approaching, then the duty arises to give the specified warning within a reasonable time, to afford an opportunity to the other vessel to keep out of the way. It is for the overtaken vessel to judge when she is so nearly approached that the proper time has arisen for the exhibition of a stern light. We are not laying down any new rule of navigation, because we are only adopting the view taken by the Court of Appeal in *The Franconia*. (1) That decision on the meaning to be attached to the words overtaking and overtaken ship, was given as regards the overtaking ship on art. 17 of the former regulations. Art. 11, which is now before us, was enacted subsequently to that decision. The collision in the case of *The Franconia* (1) occurred in daylight. But the definition in *The Franconia* (1), that if the ships are in such a position, on such a course, and at such a distance, that if it were night the hinder ship could not see any part of the side lights of, and is going faster than, the forward ship, they cannot be said to be crossing ships, but that the hinder one is an overtaking ship, is, though not an exhaustive, yet a good working definition. That rule seems to me obviously applicable to the construction of art. 11 also, and points out that the duty imposed by that article applies to a vessel overtaken in the sense there expressed. It is a reasonable and a workable construction, having regard to the object of the rule. For when the duty is cast on the overtaking ship to keep out of the way of one which she is overtaking, it is but reasonable to expect that the vessel which is to keep her

(1) 2 P. D. 8.

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course shall give to the other an intimation of her presence in a reasonable time, so that the latter may not make her manœuvres in ignorance of the presence of another ship. If this is a sound rule, it is obvious that in the present case the *Kalaja* must also be deemed to be in fault, for she was an overtaken ship, and should have warned the *Main* of her presence by shewing a light. That duty she clearly neglected. We have not to determine whether or not she exhibited a light too late, for she never shewed one at all. The present case, indeed, seems to exemplify the expediency of the rule which I have stated, for the learned President was of opinion that the *Main* would have been greatly assisted had there been a light shewn at the stern of the *Kalaja*, and it is in the highest degree probable that had there been such a light this accident would never have happened. It shews that accidents of this kind will happen, if the sole obligation as to navigation is on the overtaking ship. Upon these grounds the judgment of the President must, I think, be varied, and both vessels must be held to blame.

LORD ESHER, M.R. The real question in this case is, what construction is to be placed on art. 11, and therefore it is one of general importance. The Regulations for Preventing Collisions at Sea are divided into two classes: some of the rules fix the conduct of two vessels on the assumption that they see each other, and the daylight rules, as they may be called, are framed on this assumption. But another class of rules, which apply to lights, are only applicable at night, and are for the purpose of enabling vessels, as far as can be, to obtain a knowledge of each other's position just as if it were daylight. Then, when their positions are by these rules ascertained, the other rules as to their navigation apply as if it were in fact daylight. But it is obvious that in practice these rules did not serve their purpose where one vessel was overtaking the other in such a way that she could not see her lights. The overtaking vessel could not know the position of the other, this therefore was the difficulty to be overcome by art. 11, and the moment the difficulty is appreciated and the terms of the rule are considered, the two together plainly shew what the construction of art. 11 is. When the vessel which is coming

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up cannot see the lights of the other, she is, as far as regards the other, as if she were on the open sea without anything near her. Her officers have, then, no duty towards any one but her owners, therefore it is wrong to say, as was said by the plaintiffs, that a vessel has no right under such circumstances to deviate from her course. The duty of keeping out of the way of another ship is one which arises from the proximity of the two ships, and without such proximity there can be no such duty. If, then, the hindermost ship is in such a position that she has no means of knowing that there is another ship in front of her, an alteration of her course cannot be a negligent act, because she is in the same position as if there were no other ship near. It has been pointed out in the arguments of counsel that the hindermost vessel may have to alter her course considerably for good and sufficient reasons; but I say that if she altered her course out of mere caprice she would neglect no duty, if there were no other ship in her neighbourhood. Considering this, what is the true interpretation of the rule? We must lay down that where the leading ship has the opportunity of seeing where the other ship is, and ought to see that the hindermost vessel is going faster than she is, and is approaching from any direction in such a position that she (the hindermost ship) cannot see her lights, the obligation arises to shew a stern light. If she does not under such circumstances exhibit a light, she has broken art. 11. If she has not given the notice required by the article, why should not the other vessel be allowed the liberty which she would otherwise possess to do whatever she likes with or without reason? But the hinder ship is in this free position so long as she cannot see the side lights of the ship which is in front of her, even though she is going faster and is coming nearer. The combination of these three things causes art. 11 to be applicable. It has indeed been argued that the hinder vessel must in addition be coming nearer on a course such as will cause a risk of collision, and that she is not an overtaking ship, if she is crossing what is called the track of the other vessel. But that argument overlooks the fact that though she is crossing and coming nearer, yet she may from some reason or other alter her course and so get dangerously near the ship which is in

front of her. The rule therefore laid down in *The Franconia* (1) is a sound working one, and I agree with it as a definition, though not an exhaustive one, of what constitutes an overtaking or an overtaken vessel within the meaning of art. 11. Then it also follows that the light must be exhibited within a reasonable time. For having by the rules taken away the liberty of action of the following ship, it is my opinion that the light must be shewn at a reasonable time before the following vessel is brought into a position of danger, in order that she may know where the leading ship is and so avoid risk of collision. Whether the light has been shewn within a reasonable time must depend on the facts of each particular case and is a question for the nautical assessors. But in the present case the question does not arise, for a stern light was never shewn by the *Kalaja*. Therefore, assuming that the learned President is right in his inference of fact, I am unable to agree with so much of his judgment as acquits this vessel of blame. For his inference of fact is that the two lights of the *Main* continued to broaden on the port quarter of the *Kalaja*, and then he lays it down that if it be true that the light is thus broadening the vessels are not respectively overtaken and overtaking ships. But assuming that they were broadening, it is not therefore correct to say that the rule does not apply, for then the liberty of action on the part of the following vessel to change her course is overlooked. We are advised, however, that it is very doubtful if the lights of the *Main* were broadening, but for the purpose of our decision we are content to consider the assumption of the President as correct. The rule laid down in *The Franconia* (1) is therefore in our judgment a sound one, and is not a mere obiter dictum, for the gist of the decision there was that the vessels were respectively overtaking and overtaken ships and not crossing ships. I can see no reason why in *The Peckforton Castle* (2) doubt was thrown on this decision. As regards the case of *The Reiher* (3) it is sufficient to say that having regard to the rule we have laid down we are unable to agree with the construction of the rule formulated in that case, and such construction is inconsistent with our present judgment.

(1) 2 P. D. 8. (2) 3 P. D. 11.

(3) 4 Asp. Mar. L. C. 478.

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The result therefore is that the *Kalaja* for the breach of art. 11 must, though it is not proved that she contributed to the collision, by the law as it now stands, be also held to blame for this collision.

FRY, L.J. The question which we have to determine arises on the construction of art. 11 of the Regulations for Preventing Collisions at Sea. The terms of that article have not to do with the conduct of vessels in the daytime, for it is one of a series of articles which regulate the lights to be carried at night. By this article a ship which is being overtaken by another must shew a light. A ship, it appears to me, is being overtaken when she is a ship towards which there is another ship going at a greater speed than the first, in such a direction as to approach the first ship. But that definition is not enough in order to enable us to determine whether the second is an overtaking ship or not. We must therefore inquire what must be the position of one ship to the other in order to bring her into the position of an overtaking ship, and the other into that of a ship being overtaken. The answer to that inquiry is to be found in the Regulations themselves. The Regulations before art. 11, provide that every sea-going ship shall carry lights which cover twenty points of the whole area, thus leaving a space in which the lights exhibited do not shew. Now art. 11 introduces an additional light, and it seems most reasonable that that light should be used for the purpose of giving notice to a vessel within the area not covered by the other lights. Taking that view, it appears to me that one vessel may be said to be overtaking the other when she is within the space not covered by the green or red light, and is approaching the other ship. Equally the other vessel is being overtaken when there is within that space another ship drawing nearer to her. *The Franconia* (1) seems to me to be an authority in favour of this view. The definition of an overtaking ship in that case was based on art. 17 of the Regulations which were then in force, and was part of a chain of reasoning by which the Court arrived at their conclusion. I am inclined, therefore, to think that, notwithstanding the views of the Court of Appeal in *The Peckforton Castle* (2), the present case may be considered as deter-

(1) 2 P. D. 8. (2) 3 P. D. 11.

mined by the decision in *The Franconia*. (1) Therefore the *Main* being in the space which was in darkness, the *Kalaja* should have shewn a stern light, and is to blame for not doing so.

LORD HERSCHELL, L.C.:—I desire to add, that I concur in what the Master of the Rolls has said as to the case of *The Reiher*. (2)

Appeal allowed.

Solicitors for plaintiffs: *Waltons, Bubb, & Johnson.*
Solicitors for defendants: *Clarkson, Greenwell, & Wyles.*

E. S. R.

MYTTON *v.* MYTTON. *July* 24.

Judicial Separation—Cruelty—Condonation—Revival.

A persistent course of harsh, irritating conduct unaccompanied by actual violence but carried to such a point as to endanger the petitioner's health, and renewed after the resumption of interrupted cohabitation, *held* to constitute legal cruelty.

THE petitioner prayed for a decree of judicial separation on the ground of her husband's cruelty. The parties were married on the 26th of August, 1876. They cohabited at various places until the year 1880, when the petitioner left her husband under medical advice in consequence of his ill-treatment. She lived apart from him for several months, but in July that year she returned to cohabitation and continued to live with him until November, 1885, when she left him finally.

The case was heard before Butt, J., without a jury, and the petitioner in her evidence stated that the cruelty, which commenced during the honeymoon, consisted of harsh and irritating language and tyrannical conduct, which made her life intolerable and seriously injured her health. There was no actual violence, but he had shaken his fist in her face, saying at the same time that being a lawyer he knew the law too well to commit actual violence. The respondent was also examined in his own defence, and the other facts will be found stated in the judgment.

(1) 2 P. D. 8. (2) 4 Asp. Mar. Cas. 478.

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Bayford, Q.C. (*Searle*, with him), for the petitioner.

Torr, for the respondent, submitted that there was no legal cruelty. The cruelty before the separation having been subsequently condoned could only be revived by acts of the same character. He referred to *Evans* v. *Evans* (1); *Greenway* v. *Greenway* (2).

BUTT, J. This is a painful case, and it is quite evident to my mind that there is very little hope that these two people can ever live together peacefully and comfortably. That, however, is, in itself, no ground for a judicial separation.

It is equally clear, upon the facts of the case, and from Mr. Mytton's own letters, both in the years 1880 and 1885, that his conduct has been wholly unjustifiable. That, again, is not sufficient ground in itself for granting the prayer of the wife's petition. In order to entitle me to decree that which is asked by the petitioner, I must be satisfied of two things: first, that there was what the law recognises as cruelty perpetrated by the husband upon the wife; and secondly, assuming such cruelty to have existed and been committed in the year 1880, inasmuch as the parties lived together for several years after that, there must be such further acts of violence as to prevent the husband setting up condonation from subsequent cohabitation.

First, with regard to the incidents of 1880. It appears to me, from the evidence, that this lady was seriously ill in the months of February and March of that year. The medical gentleman who attended her has said that, in addition to this, her nervous system was weak, that she was nervous and excited, and it was in these circumstances that certain conduct of her husband produced, according to the evidence of the petitioner, of her mother, and, above all, of the doctor, results which were serious. Dr. Lynch has said, in respect of that matter: "Amongst other causes rendering the illness serious, there was the difference between the husband and wife, which was clearly aggravating the case. After she got to her mother's house, I was compelled to give directions that the husband should not see her, because, after each of his visits, I found her condition much worse." He was then speaking

(1) 2 N. of C. 470. (2) 6 N. of C. 221.

of the year 1880. In February, 1882, he attended her in another confinement, and he says that there was a nervousness and dread when her husband was coming, that, to a certain extent, retarded her recovery. Having regard to the husband's conduct in 1880, to his own letters, and the evidence of the medical man, I cannot help thinking that if, at that time or shortly thereafter, an application had been made to this Court similar to that now made it would have been granted. Although I am not aware that there were any blows, still, if the conduct of the husband be such as to endanger the life, or even the health, of the wife, that is cruelty in every sense of the word, whether we talk of "legal cruelty" or anything else. That is the state of things in 1880 and 1882. The wife had gone back to her husband, and she lived with him until the 26th of November, 1885. During part of that time he had been away. He went to Canada in 1884, and returned in March, 1885, soon after the birth of another child. Now, how did he treat his wife after 1882?

Until we come to the one occasion in the month of August, and to two occasions in the month of November, 1885, there is no specific allegation of cruelty; there is general evidence of his unkindness; but there is a letter, produced by him, from his wife to himself, written soon after his departure for Canada, and I must say that that letter speaks volumes. It is an affectionate letter, and it expresses a hope that there is a possibility of future happiness, and it ends thus: "Your loving wife—always—if only you would behave as you did in the last three or four days and renew that period of happiness all would be well. For the sake of those few days of happiness, how much I could forget!" What does that mean? Why, to my mind, it means that there was constant unhappiness, and one very small oasis of happiness. Now, what have we further? There is the matter in August, 1885, as to which there is some conflict of evidence. No doubt, Mr. Mytton was somewhat excited, but when we come to the 25th and 26th of November (the 26th being the day on which the petitioner finally left her husband), he admits that he was "drunk and disorderly" on the latter date; and as to the 25th, the evidence is that he pushed his wife when she was carrying

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Butt, J.

the child upstairs, in such a way that, if the wall had not brought her up, she and the child would have fallen on the stairs.

Whether that is an act which would warrant a decree such as is asked for, I am not prepared to say, and I do not care to inquire.

According to the authorities, it is not necessary that the subsequent acts of cruelty should be exactly of the same extent as those which have been committed on the earlier occasions. Taking that into account; and taking into account also that on the following day he was, according to his own words, given here in the witness-box, "drunk and disorderly;" that the wife left his house in terror; that the servant-girl ran out into the garden and remained there, afraid to come in, for half-an-hour, and that the wife left her home, in consequence of those acts, never to return again—I think not only that she left her home in bodily fear, but that she was justified in leaving it.

On the whole, I think there is sufficient to justify me granting a judicial separation, with costs, against the husband—the wife to have the custody of the child, with the usual conditions as to access of the husband.

Solicitor for petitioner: *F. C. Greenfield.*
Solicitor for respondent: *C. H. Hodgson.*

W. L.

PETERS *v.* TILLY, WILLIAMS, AND OTHERS. 1886

Probate—Two Wills—Fresh Actions—Further Evidence—Stay of Proceedings—Costs. *Aug.* 10, 11.

The next of kin of a testator instituted a suit for administration with a will annexed bearing date 1868, of which the sole executor and universal legatee was the testator's wife, who predeceased him. In opposition parties claiming to be legatees set up the contents of a later will alleged to have been executed in 1877 or 1878, but which could not be found. The Court of Appeal, reversing the judgment of the Probate Division, decided that there was not sufficient evidence of the contents of the second will, and their decision was affirmed in the House of Lords.

A fresh suit for probate of the second will was then commenced by the executor of the testator and residuary legatee of the will of 1877–78, who had been the confidential solicitor of the deceased, and who had acted as solicitor for the legatees all through the litigation. This suit was founded upon fresh evidence of the contents and execution of the second will:—

Held, that although the plaintiff had been privy to the prior action, an application to stay the proceedings generally could not be granted, but that the proceedings ought to be stayed until the costs of the plaintiffs in the prior action had been paid.

THIS was a motion on behalf of the defendants in the action to stay further proceedings in it, to order the plaintiff to pay all the costs of the action, and to grant administration to the defendants of the personal estate and effects of John Hill Morgan, deceased, with a will annexed bearing date the 24th of December, 1868.

John Hill Morgan, late of Bristol, deceased, died on the 6th of June, 1883, leaving a will duly executed bearing date the 24th of December, 1868, whereby he bequeathed all his real and personal estate to his wife, and appointed her his sole executrix. In 1872 the deceased separated from his wife, and in 1880 he obtained a decree absolute dissolving the marriage on the ground of her adultery, and she predeceased him in 1882.

Mr. Peters, the plaintiff in the present action, had been the confidential solicitor of the deceased, and on the 19th of June a subpœna was issued commanding him to bring in and leave in the Probate Registry the said will of the 24th of December, 1868—which was then in his possession—and the will was duly brought in.

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On the 27th of June Mr. Peters entered an appearance, claiming to be the executor of a later will executed in the latter part of 1877 or the beginning of 1878.

On the 29th of June, 1883, an action was commenced on behalf of Elizabeth Goulstone (since deceased), Ann Williams, one of the defendants in the present action, and Susannah Baillie, claiming to be cousins german once removed and next of kin of the deceased, claiming that letters of administration, with the will of 1868 annexed, of the estate of the deceased be granted to them.

An appearance was entered in this action on behalf of Edward F. Woodward, Eliza Peters, and Mary H. Quick, who in a statement and amended statement of defence and counter-claim, claimed to be legatees under a will of the deceased alleged to have been executed by him in the latter part of the year 1877 or the beginning of 1878. The amended statement further alleged that the will had never been revoked, but that it had been lost or mislaid; and it set out the purport of the lost will, which, it was alleged, contained various specific pecuniary legacies, including legacies to each of the defendants, with a bequest of the residue of the testator's estate to Mr. Peters, who was appointed sole executor. They claimed accordingly that probate should be granted of the will in solemn form. Subsequently other alleged legatees were allowed to come in and join in this defence.

The case was heard before Butt, J., without a jury on the 27th and 28th of October, 1885. The principal witness to prove the contents and execution of the alleged will of 1877 and 1878 was Mr. Peters, the executor and residuary legatee, who also acted as solicitor for the defendants. He stated that the deceased had brought him instructions for the will, but that he refused to make it on learning that he was to have the residue, which would amount to nearly 20,000*l*. He repeated the contents of these instructions from memory, and stated that the deceased had come to him afterwards and said: "I have made the will as proposed." The will was alleged to have been made by Mr. Perrin, a solicitor practising in Bristol, who had since absconded, and there was the evidence of clerks and others that a will had been executed about this time, though it could not be found.

On the 28th of October Butt, J., pronounced judgment establishing the will of 1877–78 as set out in the amended counterclaim of the defendants, and admitting it to probate.

The plaintiffs (the defendants in this action) appealed against this order, and on the 1st of July, 1885, the Court of Appeal made a decree reversing so much of the order as pronounced for the validity of the will of 1877–78 "without prejudice to any application for probate of the said will if found and produced," but on the 11th of August, 1885, on the motion of the plaintiffs, the decree was amended by striking out these latter words.

The defendants subsequently appealed to the House of Lords against these two orders, and on the 16th of July, 1886, the House of Lords delivered judgment dismissing the appeal, and confirming the order of the Court of Appeal. Mr. Peters continued to act as solicitor to the legatees under the alleged will of 1877–78, and while the appeal was pending in the House of Lords he filed an affidavit in support of a petition presented on their behalf praying for a commission to examine in the United States Mr. Perrin, the solicitor, who was alleged to have made the will of 1877–78, and who, after many inquiries, had been discovered in the United States. Since the hearing of the cause he had made an affidavit that he had prepared a will for the deceased, which was duly executed in the month of October, 1877, and which remained in his custody until he left Bristol, when all his papers and books passed into the hands of his assignee in bankruptcy, who it was suggested had sold them for waste paper. Mr. Perrin in his affidavit set out such of the contents of the will as he could remember, but he was clear that the appellants were all named legatees, and that Mr. Peters was named residuary legatee and sole executor. Mr. Peters appeared personally in support of this petition before the appeal committee, but it was reserved to the hearing of the appeal at the Bar, and was dismissed along with it.

On the 26th July, 1886, Mr. Peters instituted the present action against the defendants as claiming to be next of kin of the deceased; and in his statement of claim claimed to be the sole executor and devisee and residuary legatee of the last will of the deceased, bearing date on or about the month of October, 1877.

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The defendants entered an appearance, and now applied to the Court for a stay of proceedings.

Fischer, Q.C. (*Searle*, with him), for the defendant Williams, in support of the motion, submitted that Mr. Peters had been a party to the proceedings all through, and had been fighting his own battle through the medium of the legatees.

[BUTT, J. The question is whether he is debarred from shewing the contents of the will by further evidence in a new action.]

There is no necessity for a new action. Mr. Peters could have intervened and could have given the same evidence at any time, and he can intervene now in the existing suit, which is not at an end, inasmuch as no judgment granting probate or letters of administration has been pronounced. If Mr. Peters can produce the will let him do so, and then there will be no necessity for letters of administration; but his action under the circumstances is frivolous and vexatious. [They cited *Wytcherley* v. *Andrews* (1); *Ratcliffe* v. *Barnes* (2); *Newell* v. *Weeks* (3).]

Sir J. P. Deane, Q.C. (*Barnard*, with him), were heard for the defendants, Tilly and another.

Inderwick, Q.C. (*R. A. Pritchard*, with him), for the plaintiff. There can be no estoppel except where a party who has been privy to the litigation wishes to raise over again the very same question which has been already decided by the Court. Here that is not the case, because it has never been decided that there was no such will as that of 1877–8 in existence, but simply that the contents were not proved to the satisfaction of the Court, and Mr. Peters now comes forward with fresh evidence.

[BUTT, J. It is not a question of estoppel, but simply whether the Court is not bound to interfere to put a stop to vexatious litigation. Suppose Mr. Peters has fresh evidence, can he not intervene in the original suit?]

Even if he has a right to intervene, that does not debar him from his alternative remedy, but he cannot intervene after the judgment.

Cur. adv. vult.

(1) Law Rep. 2 P. & D. 327. (2) 2 S. & T. 486.
(3) 2 Phill. 224.

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BUTT, J. This was a motion to stay proceedings in the present action on the ground that an action between the same parties had already been tried and determined in this Court, in the Court of Appeal, and in the House of Lords, and that the plaintiff who is now carrying on these proceedings was privy to that action. For the defendant it was strongly urged that a fresh action such as this must be wrong because the proper course to adopt if the plaintiff had any right to interfere at all, was by intervention in the suit which was pending. I expressed some doubts whether a party could intervene after the hearing. I have made inquiries, and, so far as I am able to obtain information, there has been no case allowing intervention in a case of this sort after the hearing. I think it is very doubtful whether Mr. Peters could have intervened in the original suit. But it appears clear to me that under some circumstances, in some form or other, it must have been open either to Mr. Peters or to the plaintiff in the original suit to adduce further evidence—for instance if the will had been found—or a copy. It cannot be said that the judgment barred this proceeding. Now really the difference between intervention in the suit and the institution of a new suit, supposing the parties to be minded to take further proceedings at all, is scarcely tangible. Therefore in the existing state of things I must decline to accede to the application for an absolute stay of proceedings. But the plaintiff in the present case was not only privy to that action, he was really the defendant. That is apparent from the whole tenor of the proceedings, and from his own admission. I therefore do not think it right or equitable that he should be allowed to proceed until the costs in the former action have been paid. The order I make on this motion is to stay all proceedings in the present action until the defendants in the other action have paid the costs ordered to be paid by them. The question of administration may stand over for further application.

Solicitors for the plaintiff: *Freemans & Dicker.*

Solicitors for defendant Williams: *W. Vaughan Williams.*

Solicitors for Tilly and other defendants: *Guscotte, Wadham, & Daw.*

W. L.

1886
June 11.

CRAWFORD *v.* CRAWFORD AND DILKE (THE QUEEN'S PROCTOR INTERVENING).

*Divorce—Decree Nisi—Queen's Proctor's Intervention to disprove the Adultery—Fresh material Facts—Pleadings—*23 & 24 *Vict. c.* 144, *s.* 17.

The Queen's Proctor may intervene to shew cause why a decree nisi should not be made absolute on the ground that the charge of adultery on which it was granted was not true, and he is at liberty to adduce evidence of fresh material facts for that purpose.

In such an intervention it is sufficient for the Queen's Proctor to plead that the decree was obtained contrary to the justice of the case by reason of material facts not having been brought to the knowledge of the Court.

THIS was an application to strike out the plea of the Queen's Proctor intervening to shew cause why a decree nisi dissolving the marriage should not be made absolute.

The petitioner, Mr. D. Crawford, M.P., presented a petition praying for the dissolution of his marriage with the respondent, Mrs. Virginia Mary Crawford, on the ground of her adultery with the co-respondent, the Right Hon. Sir Charles Wentworth Dilke, M.P.

The case was heard before Butt, J., without a jury on the 12th of February, 1886, and the chief witness examined in support of the petition was the petitioner himself, who related at length and in minute detail confessions made to him by his wife, in which she described various acts of adultery committed by her with the co-respondent ranging over a period of several years. Two other witnesses were examined who confirmed the evidence of the petitioner in minor particulars.

The respondent and co-respondent, who had filed answers denying the adultery charged in the petition, were represented by counsel, but they did not cross-examine the petitioner or his witnesses, and at the close of the petitioner's case they intimated that they did not intend to call witnesses.

The learned judge thereupon found that the respondent had been guilty of adultery with the co-respondent, but that, on the authority of *Robinson* v. *Robinson and Lane* (1), there was no admissible evidence to shew that the co-respondent had been

(1) 1 Sw. & Tr. 362.

guilty of adultery with the respondent. He therefore dismissed the co-respondent from the suit with costs, and pronounced a decree nisi dissolving the marriage.

On the 5th of May the Queen's Proctor intervened shewing cause why the decree nisi should not be made absolute, and filed the following pleas:—

1. That the said decree was pronounced contrary to the justice of the case by reason of material facts not having been brought to the knowledge of the Court.

2. That at the hearing of the said suit the case for the petitioner was based upon the several allegations contained in confessions alleged by the petitioner to have been made to him by the respondent, and which confessions the petitioner deposed to in his evidence; and no evidence was adduced on the part of the respondent and co-respondent.

3. That at the hearing of the said suit there were available within the knowledge of all or some of the parties divers witnesses, some of whom were then present in court, and whose names were mentioned, or who were referred to in the alleged confessions and who were not called, but whose evidence was material to enable the Court to arrive at a just decision of the case upon the question whether the said alleged confessions were true or false.

4. That apart from the alleged confessions by the respondent deposed to by the petitioner, no evidence was adduced at the hearing of the said suit to prove that the respondent had committed the adultery alleged in the petition.

On the 17th of May an application was made in the registry on behalf of the petitioner that the Queen's Proctor be ordered to furnish particulars of his pleas, and the registrar made an order, which was confirmed by the President in chambers, that the Queen's Proctor should, within seven days from the service of the order, file in the registry and furnish to petitioner further and better particulars of the material facts alleged in paragraph 1 of his plea: the names of the witnesses who were present in Court, whose names were mentioned, who were referred to in the alleged confessions, and other witnesses referred to in paragraph 3, with the material facts referred to in their evidence.

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The Queen's Proctor accordingly filed the following particulars:—

1. The material facts not brought before the Court, and the names of the witnesses are as follows:—

2. Names of the witnesses

(*a.*) who were present in court at the hearing:

1. Henry Shanks.
2. William Ireland.
3. Ellen Drake.
4. William Goode.
5. Charles Wentworth Dilke.
6. Charles Stewart.

(*b.*) whose names were mentioned in the alleged confessions.

1. Christina Ethel Adelaide Rogerson.
2. Sarah Gray.
3. Fanny Gray, now Fanny Stock.

(*c.*) who were referred to in the alleged confessions:

1. Charles Grant, coachman to Sir Charles Dilke.
2. Henry Shanks.
3. William Goode.
4. Samuel Goode.

} Footmen to Sir Charles Dilke.

(*d.*) Other witnesses:

The respondent, who if she comes within the jurisdiction of the Court, will be called by the Queen's Proctor as the witness of the Court.

3. The following are the material facts to be deposed by the aforesaid witnesses:—

The witnesses, Sarah Gray, Ellen Drake, Henry Shanks, William Goode, Samuel Goode, William Ireland, and Charles Grant, will be called to prove:

1. That during the years 1882, 1883, and 1884, Mrs. Crawford was not inside the house 76, Sloane Street on more than about six occasions.
2. That when Mrs. Crawford came into the said house the door was opened to her by one or other of Sir Charles Dilke's footmen, and she was shewn into a room on the ground floor.

3. That on none of these occasions did Mrs. Crawford go upstairs.
4. That the visits of Mrs. Crawford, above referred to, took place between the hours of 10·30 A.M. and 12 noon, during which hours the footmen were on duty in the hall at 76, Sloane Street.
5. That Sir Charles Dilke breakfasted in a room on the ground floor at 10·30 A.M. or thereabouts.
6. That during the parliamentary sessions, Sir Charles Dilke's brougham was at the front door of 76, Sloane Street every morning at 11·30 A.M.
7. That the only time in the day when Sir Charles Dilke received visitors and transacted public and pirvate business at 76, Sloane Street was between 10·30 A.M. and 12 noon.

Fanny Stock and Sarah Gray will be called to prove—

8. That on no occasion during the years 1882, 1883, and 1884 did either of them see Mrs. Crawford in Sir Charles Dilke's bedroom, nor in any room with him.
10. That on no occasion did Sarah Gray help to dress Mrs. Crawford at 76, Sloane Street.
11. That Fanny Stock was not Sir Charles Dilke's mistress.
12. That during the three years in question Fanny Stock only went to 76, Sloane Street on some occasions to see her sister Sarah Gray, and on none of such occasions did she either see Mrs. Crawford or Sir Charles Dilke.

Mrs. Rogerson will be called to prove:

13. That the allegation contained in the alleged confession that Sir Charles Dilke told her (Mrs. Rogerson) of the adulterous intercourse which was going on between himself and the respondent, and asked her (Mrs. Rogerson) to be kind to Mrs. Crawford is untrue; and further, that when she (Mrs. Rogerson) went to nurse Mrs. Crawford at 27, Young Street, in 1884, it is untrue that she went to Mrs. Crawford in consequence of a promise made by her to Sir Charles Dilke that she would be kind to Mrs. Crawford.

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Charles Grant will further prove:

14. That during the years 1882, 1883, and 1884 he was Sir Charles Dilke's coachman, and that only on five or six occasions did he drive Sir Charles Dilke to 27, Young Street; that such visits lasted at the most fifteen minutes, and on each occasion he could see into the room in the house, 27, Young Street, in which Sir Charles Dilke was during each visit, and no impropriety was committed by Sir Charles Dilke on such occasions.

Mr. Charles Stewart will produce a correspondence between himself and Mrs. Crawford, and will prove:

15. That Mrs. Crawford has always refused to allow him to take down her confession in writing and also to give him a written confession.

Sir Charles Dilke will be called to prove:

16. That every allegation in the alleged confession that Mrs. Crawford has committed adultery with him is untrue.

4. The Queen's Proctor has been informed and believes that the following persons, Henry Shanks, William Ireland, Ellen Drake, William Goode, Charles Stewart, Sir Charles Dilke, were present in the Court at the hearing of the petition, and that Henry Shanks, William Ireland, and Ellen Drake, were there in obedience to subpœnas served on them on behalf of the petitioner and of the co-respondent, and that William Goode was subpœnaed on behalf of the petitioner only, and therefore that the above-named persons were present to the knowledge of the parties on behalf of whom they were subpœnaed, but the Queen's Proctor is unable to say whether any, and if so, which of these persons were there to the knowledge of the respondent.

Inderwick, Q.C. (*R. S. Wright* with him), now moved to strike out the plea of the Queen's Proctor as disclosing no ground for intervention. In all the cases up to this time the material facts have been held to be facts which would disentitle the petitioner to his decree quite apart from the evidence given at the trial. There must be something in the personal conduct of the petitioner

which would raise the question of the discretion which is vested in the Court to refuse the decree. In this case no collusion is charged nor any misconduct on the part of the petitioner, and the substance of the application appears to be that the Queen's Proctor desires leave to intervene, because the result of the case is not satisfactory to him in the exercise of the functions vested in him by the State. But it has been decided on more than one occasion that the Queen's Proctor is not entitled to have a new trial because the result of the trial was not satisfactory to him, and that he can only intervene by bringing before the Court such facts as if known to the judge trying the case would, not necessarily, but probably [THE PRESIDENT: Or possibly] have induced him to refuse the decree independently of any charge which might have been established against the other party. The Court must be the judge whether the facts are material, but in the particulars delivered by the Queen's Proctor there are no material facts stated which were not or could not have been brought before the Court at the trial. Of the witnesses named in the particulars some were in attendance and could have been called if they had been required, others, according to the particulars of their evidence furnished, only confirm the case of the petitioner, and others were under the control of the co-respondent and could have been called at the trial. The same observation also applies to Sir Charles Dilke, in whose interest apparently the intervention is made, but who if he had chosen could have given evidence at the trial. As to what constitute "material facts" they cited *Howarth* v. *Howarth* (1); *Phillips* v. *Phillips* (2); *Davy* v. *Garrett.* (3)

Sir W. Phillimore (*Bargrave Deane*, with him), for the Queen's Proctor, was not called on.

THE PRESIDENT. The question raised is an important one but I entertain no doubt about it. The particular question raised on behalf of the petitioner is this—whether, where a specific charge of adultery has been investigated and decided in the affirmative, the Queen's Proctor may intervene for the purpose of

(1) 9 P. D. 218.

(2) 4 Q. B. D. 127.

(3) 7 Ch. D. 473.

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shewing that the finding ought to have been the other way by reason of material facts not being before the Court. It is said that in previous cases the Queen's Proctor has intervened for the purpose of establishing fresh charges, and that he has been required to give evidence of fresh charges, and not to give evidence in confirmation of those charges which have been previously investigated and determined. But I am of opinion that the Queen's Proctor would be entitled in a case where he was seeking to establish charges of adultery to bring forward fresh material facts in support of the same charges. I went fully into the subject in the case of *Gladstone* v. *Gladstone* (1), and I endeavoured to lay down a rule which would be of service as a guide to myself and to practitioners in the Court. In that case I gave as an illustration that where there were particular facts brought forward in support of a particular charge of adultery which had already been gone into, I should not think that calling other witnesses to that particular charge would be allowable, but I did not intend to exclude the idea that the Queen's Proctor might bring forward facts of an entirely new character for the purpose of establishing the charge of adultery originally made. But,—however that may be in a case where the Queen's Proctor intervenes to establish a charge of adultery,—it is to be observed that where he says on the contrary that the charge was not well founded it is of the necessity of the case, if he is to intervene at all, that he must produce fresh material facts for the purpose of shewing that the specific charge and the facts produced in support of it were not true. That is the only purpose for which such an intervention could take place and the only circumstances in which it could succeed. Numbers of illustrations were given to shew that there may be cases in which the Queen's Proctor would be entitled to intervene for the purposes of shewing that the charges could not be true—insanity, an alibi, absence from the country, and so on. But these are only illustrations of what are material facts for the purpose of disproving charges which have been erroneously substantiated or treated as proved. With regard to the material facts which have been alleged in this case, I say now what I have said before, that the pleadings have been unnecessarily expanded

(1) Law Rep. 3 P. & D. 260.

on the part of the Queen's Proctor. He might have contented himself with the first paragraph—that the decree was pronounced contrary to the justice of the case by reason of material facts not being brought to the knowledge of the Court. He has unnecessarily gone on to insert in his plea further statements that witnesses were in Court, to the knowledge of the parties, that witnesses were not called who might have been called, and so on. I do not think that any of these charges raise the question which it is necessary for Mr. Crawford to meet. He has only to meet the issue—raised by the first paragraph—whether or not this decree was pronounced contrary to the justice of the case, &c. As the Queen's Proctor had given the names of a number of witnesses, I thought it but fair when the case was before me in Chambers that particulars should be given, and I certainly did add that a précis of the facts which they were expected to prove should be given, in the same manner as is done in criminal cases. If that has not been done then an order must be made that the Queen's Proctor furnish the information. But with regard to the material facts they appear to me to amount to this, that the confession which it is alleged Mrs. Crawford made is not a confession of real facts—but it is the product of her imagination or of some motives which are not disclosed. Let us look at what is the theory of this enactment. It supposes that the public is interested in seeing that no marriage is dissolved except on certain grounds which, in a case of this kind, would be that the woman had committed adultery, and if the Queen's Proctor comes to the conclusion that there is a ground for supposing that a decree has been obtained contrary to the justice of the case, then it is his duty to intervene. I wish to express in the strongest possible manner my repudiation of the notion that this intervention has been undertaken in the interests of the co-respondent. If it were so the Queen's Proctor would have failed in his duty. I must assume that the Queen's Proctor has acted not for the protection of the co-respondent, but because he thinks that the facts require that the Court should come to the conclusion that the confession of Mrs. Crawford is not true. There can only be one way of doing this, and that is by shewing that her statements were untrue. One of them was a very striking fact. Mrs. Craw-

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ford stated that she was in the same bed with another woman and Sir C. Dilke, but it now appears that there is reasonable ground for supposing that this woman will come forward and deny it. Another important statement was that another woman had helped to dress Mrs. Crawford after her assignations with Sir C. Dilke. But it is said that that also will be denied. These are illustrations of the facts which, as I have pointed out, the Queen's Proctor may bring forward to prove that the charge of adultery was improperly established.

It appears to me, therefore, that the Queen's Proctor's plea is good, though it is redundant, and I refuse the application to strike it out.

Solicitors for the petitioner: *Markby Stewart & Co.*

W. L.

July 1.

[IN THE CHANCERY COURT OF YORK.]

NOBLE *v.* AHIER.

Ecclesiastical Law—Church Discipline Act (3 & 4 *Vict. c.* 86), *s.* 13—*Rules of Court—Place of Hearing—Offence committed out of the Northern Province.*

The judge of the Chancery Court of York has power under the Church Discipline Act to make a rule that the hearing of cases in that court shall take place without the local limits of the court.

The Chancery Court of York has jurisdiction to hear a suit against a clergyman beneficed in the province of York in respect of offences alleged to have been committed by him without the limits of the province.

OBJECTIONS to the admission of articles, and protest against the jurisdiction of the Court. The suit was one against the Rev. Mr. Ahier for offences alleged to have been committed by him without the province of York. The hearing took place at Westminster under the authority of the Rules of May, 1886, whereby the judge of the Court ordered that the hearing of causes and motions might take place in London or Westminster. These rules were made by him under the Church Discipline Act (3 & 4 Vict. c. 86), s. 13.

Jeune, for the promoter, moved the Court to admit the articles filed.

The defendant in person objected to the admission of the articles, and also protested against the jurisdiction of the Court.

The facts and arguments are fully stated in the judgment of the Court.

The following cases were referred to: *Ex parte Green* (1); *Mouncey* v. *Robinson*. (2)

Cur. adv. vult.

The following judgment was subsequently delivered at York:—

LORD PENZANCE. The defendant in this case raised two questions which, on the authority of the Rules and Orders of May, 1886, made for the improvement of the practice in this Court, I directed to be argued at Westminster.

The defendant appeared in person to argue them, having previously produced a written protest against the arguments taking place in London, which he desired to have recorded in the court.

I directed it to be so recorded, no objection being made thereto by Mr. Jeune, the learned counsel who appeared on the part of the promoter.

Mr. Jeune did not make any protest against the new rule on the promoter's part, but in answer to me expressed an opinion against the legality of the rules in question, and at my desire stated the reasons upon which that opinion was founded. I will recur to them presently.

Passing by for the moment all question as to the legality of the new rules, I proceed to deal with the objections raised in the suit by the defendant. The first question was as to the jurisdiction of the Court. He contended that the Court of the Northern Province could not entertain a charge of immorality based upon conduct and actions which took place in the other province. In my opinion, such a contention is not arguable. The defendant being a beneficed clergyman in the province of York, is within the jurisdiction of this Court, and his offences are the subject of examination and censure here, in whatever part of the country they are committed. This point must therefore be decided

(1) 7 Q. B. D. 273. (2) 37 L. J. (Ecc.) 8.

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against him. The only other question raised by him took the form of an objection to the admission of the articles. But all that he said upon this matter amounted to no more than this; that some of the acts complained of, especially that charged against him as having taken place at Whitehaven, did not occur within two years before the commencement of the suit. It was pointed out to him, however, that the articles each and every of them charged the offences in distinct terms to have been committed within two years before the suit commenced, and that whatever objection might arise when the facts came to be proved, the articles themselves were free from objection. To this he had no answer to make. The articles must consequently be admitted. And it was to discuss these two futile, and indeed almost absurd objections, that under the practice of the Court as it existed before the making of the rules above mentioned, the judge and counsel must have travelled down from London to York and back. No case could have better illustrated the grievous burthen which such a practice imposes upon the suitors in this Court, a burthen which it was the object of the new rules to remove. Every interlocutory discussion, every application to the Court in the course of the suit of however trifling a character —such as are dealt with in chambers in the temporal courts— must, if it involved a discussion before the judge, be heard at York; and if the assistance of counsel is desired it can only be obtained at the grievous expense of specially retaining counsel to attend there. I find, upon consulting the registrar, that the amount of counsel's fees which is allowed on these occasions in taxing costs between party and party is at least twenty-five guineas, and between solicitor and client thirty-five guineas, so that the losing party on every such trifling application to the Court, if supported by counsel, such as an application for further time, or for particulars, or for amendment of any kind in the proceedings, would be liable to pay fifty guineas in fees, when the matter, if heard at Westminster with the services of the entire Bar at hand, might be disposed of at a cost of ten guineas or less.

The legislature having in the Church Discipline Act intrusted the judge with a general and unrestricted power of altering the

practice of the Court in any way with a view to its improvement in the interests of the suitors; I had to consider whether this matter, this question of the place in which the judge should hear the arguments of counsel, was a matter of practice or not.

For if it was, I had, as I conceived, the power to deal with it, and the exercise of that power in relief of so pressing a grievance was nothing short of a duty.

I confess it appears to me that everything which constitutes a part of what I may call the machinery of justice in its administration, is a matter of practice. The forms in which the parties shall present their respective cases; the times fixed and allowed for the successive steps in a suit; the times and places, whether in court or chambers, at which applications to the judge should be made and heard; the forms to be followed; and the rules to be observed in the entire progress of the suit; these things do not concern the law or justice involved in the suit on either side, but only the mechanical arrangements under which the opposite contentions of the suitors may be best presented to the judgment of the Court, and are consequently matters of procedure or practice.

But then it was argued by Mr. Jeune, that a power to alter the practice, however wide and unlimited, does not involve a power to enlarge, or increase, the jurisdiction of the Court. He cited no authorities, with the exception of the case of Mr. Greene, which is reported in THE LAW REPORTS. (1)

In that case several technical objections were taken with the view of setting aside the proceedings under which Mr. Greene had been imprisoned, and among them was an objection that the Vice-Chancellor of the Duchy of Lancaster had, when sitting in London, ordered a certain process to issue from the registry in Lancashire. The case is not very valuable as an authority on the present occasion, for neither at the bar, nor by the bench, was there any argument or citation of authority upon the question of judicial action in a place outside the limits of the Court's jurisdiction; but the Court passed by all question upon that head, because the facts did not give rise to it, inasmuch as the judges were of opinion that the act was not a judicial act at all,

(1) 7 Q. B. D. 273.

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and on this ground overruled the objection. But it is to be remarked that Cotton, L.J., said (1), "What he did was unnecessary, and merely, I presume, because before giving any direction to the officer of the county palatine, he thought it right that the party should have the opportunity, if he thought fit, of coming before him and stating his objections." From this it may be inferred that, in the opinion of the learned judge, had the suitor's objections been stated and heard, there would have been nothing illegal in what was done, although the hearing took place in London.

I entirely agree, however, with Mr. Jeune's contention, that the legislature did not intend by giving the judge power to amend the practice, to increase what is ordinarily understood as the jurisdiction of the Court; and to obviate all question on that score, I was careful that it should be stated negatively on the face of the new rules that all exercise of the powers of the Court should take place as hitherto at York, and that what was done at Westminster should be limited to the hearing by the judge of the arguments of the parties or their counsel. There is no more obligation on the parties (under these rules) to attend and assist the Court by their arguments, than there is in any case in any court. It is of the essence of a fair administration of the law, that reasonable and adequate opportunity should be afforded to both parties to support their contentions, in the course of the suit, by the arguments of themselves or their counsel before the judge, if they so desire it; but their doing so is not obligatory upon them, and their abstention does not relieve the Court from the duty of a right decision when it comes to decide.

Under these rules, then, as they stand, none of the powers of the Court, coercive or otherwise, are exercised beyond the limits of the province. Much fallacious argument has at times had its origin, as it seems to me, in a loose and improper application of this word "jurisdiction." In the successive cases which arose of late, both in the Court of Arches and here, upon questions of ritual, writs of prohibition were constantly applied for in the temporal courts upon grounds which involved the fallacy of treating alleged departure from practice as excesses of jurisdiction.

(1) 7 Q. B. D. at p. 293.

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The Ecclesiastical Courts, it was said, had only the power to act in accordance with settled practice, and if they departed from this practice they exceeded their powers, and so exceeded their jurisdiction.

These views did not prevail. In the end it was determined in all these cases, some of which were carried to the House of Lords, that jurisdiction was one thing, and practice another, and that if the Ecclesiastical Courts had jurisdiction over the offender, and the offence, and had not exceeded its powers in the character or nature of the censure it pronounced, it had not exceeded its jurisdiction.

It was admitted that no prohibition could be granted unless the Ecclesiastical Court had exceeded its jurisdiction, and the supposed excess consisted amongst other things of alleged departures from established practice. In this way, therefore, it came to be considered how far jurisdiction was involved in such matters of practice. Thesiger, L.J., treated the matter as fully and clearly perhaps as any of the judges in the Appeal Court, and this is what he said: "The proceedings would not have been properly the subject of a writ of prohibition, even if not warranted by ecclesiastical law and practice. We have in this case the Court of Arches, a Court of competent jurisdiction, seised under letters of request, and through the medium of a properly instituted suit, with jurisdiction over the respondent in respect of certain offences against ecclesiastical law. The mode in which that suit is to be conducted, the sentence which it is open to the judge to pronounce, and the means by which that sentence is to be enforced, are all to be regulated by the practice of the Court itself and in respect of which if the judge errs appeal, and not prohibition, would be the proper remedy:" *Martin* v. *Mackonochie*. (1)

"The mode in which the suit is conducted." Nothing could be more general and comprehensive than this language. Surely the place at which, and the times at which, the judge arranges to hear the arguments of the parties, form a part of the mode in which a suit is conducted.

This, I conceive, is in conformity with the true and proper

(1) 4 Q. B. D. 697 (732).

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definition of "jurisdiction." The limits, territorial or otherwise, within which a Court has power over the individual suitor, and the subject matter of the suit, and the nature and extent of the remedies it is authorized to afford, or the censures it has the power to inflict, these are what constitute the limits of a Court's "jurisdiction." But as a Court does not derive its jurisdiction from the place where it locally exercises its functions, so it cannot increase that jurisdiction by any extension of the local limits within which those functions are exercised.

If this Court, for instance, were by statute directed to exercise all the powers with which it has time out of mind been invested, not in York, but in London, and to issue all its process therefrom, such a provision would add nothing to its jurisdiction. It would not have gained jurisdiction over any additional person or cause, or achieved any addition to the remedial or correctional powers with which it is already invested. Whatever authorities may be cited (though none were cited to me by Mr. Jeune) for the proposition that where the jurisdiction of the Court exists only over persons residing or acting within a certain district, the actual exercise by such Court of its powers must take place within that district, it will be found that they rest upon a basis purely technical.

A limitation of this kind will in many, if not most cases, coincide with convenience and economy; but where it fails to do so, there seems to be no reason of substance for its adoption. But I did not desire to raise any such question, and for the avoidance of it I was at some pains to insert in the new rules the negative provisions, to which I have already referred, whereby the exercise of all the powers of the Court was restricted to York. If this restriction is complied with, it would be pressing technicality a long way to subject the deliberations of the judge, the discussions of counsel, and everything that passes in the course of the suit, to a similar restriction, at whatever cost in money and convenience to the suitors for whose benefit all technical rules ought to exist.

I have grave doubts therefore whether the rules under consideration can be said to be open to objection as exceeding anything that can properly be called jurisdiction.

But assuming for the moment that they do so, it can hardly be denied that it is jurisdiction in a matter of practice.

This makes it necessary to consider what is the scope and what are the limits, if any, of the statutory power conferred on the judge under the Church Discipline Act, because it was quite competent to the legislature, if so disposed, to confer on the judge a power to establish any new and beneficial system of practice, whether it involve the doing or happening of something outside the territorical limits of the Court's jurisdiction or not. The enactment is as follows: "Provided always that the judge of the Court may, and he is hereby authorized, and empowered from time to time, to make any order or orders of Court for the purpose of expediting such suits, or otherwise improving the practice of the said Court, and from time to time to alter and revoke the same."

The first thing that occurs on reading this enactment is, that there is no restriction or qualification attached to the general power to alter and amend the practice of the Court. Anything and everything which tends to expedite the suits entertained by the Court, or which can properly be called a matter of practice, is, so far as the express words of the statute are concerned, the subject of orders for improvement at the hands of the judge. If there is any restriction, or exception, under which all improvements are subject to the qualification, that all which is done must be done within the province, such restriction must be implied for it is not expressed. And why should it be so implied? Why should the express words of the Act be construed by implication to be thus limited? That under the form of altering and improving the practice of the Court its powers and authority should not be enlarged or increased, is intelligible enough, and it would be reasonable to infer that when legislating for improved machinery only, parliament did not intend the enlargement of power or authority. But why in an essentially remedial enactment should the Court read into it a restriction, or qualification, dictated by no requirement of either law or justice, violently opposed to the convenience and pecuniary interests of all parties, and conceived only in a spirit of the narrowest and harshest technicality.

In old times the Courts of Law did much to extend the scope

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of all legislation of a remedial character, and did not scruple even to include in the purview of an Act of Parliament persons and places which could not be included without straining and palpably extending the language in which such legislation was embodied. The well known statute of the 13 Edw. 1, "Circumspecte agatis," which was applied by the Courts of Law to all bishops, although the Bishop of Norwich only was named in it, is a familiar example. Such powers are not asserted or acted upon by the bench in modern times, and the judges have even ceased very much to lean upon those rules of construction by the aid of which their predecessors endeavoured to frame a system under which the construction to be placed upon the language of the legislature might shape itself into something like uniformity. The complexity and multiplicity of modern statutes, as compared with those of old days, have done much to bring about this result. But I have never heard that the well-established canon of construction that a remedial statute should be construed liberally has no longer any meaning or application, and still less that the Courts of the present day would think it right to insert in statutes of that nature, restrictions or qualifications dictated by no general requirements of justice, and which are neither directly expressed, or pointed at inferentially by the actual language employed. Strong authority on this point is to be found in the cases of *Johnes* v. *Johnes* (1) and *Atcheson* v. *Everitt.* (2)

The insertion of restrictions which are not expressed ought at least to rest upon some reasonable presumption, connected either with abstract ideas of justice, or with what is obviously fitting or convenient. But in a case like the present what presumption can arise, from such or the like sources, that the legislature could not have intended that anything should be done in the suit out of the province, however much the convenience and pecuniary interests of the suitors pointed the other way? There is only, I think, one other statute that can be said to be in pari materiâ with the Act under discussion, and that is the Public Worship Regulation Act. It is permissible to refer to this statute as an aid to construction, and what do we find?—a distinct enactment empowering the judge of the Court of the Northern Province to

(1) 3 Dow. 15. (2) Cowp. 391.

hold all his sittings in London in all cases arising under the Act.

A consideration pointing the same way is to be found in the canons of the Church. The 125th canon of A.D. 1603, speaking of the places where Ecclesiastical Courts are held, declares that they "shall be convenient for the entertainment of those that are to make their appearance there and most indifferent for their travel." Although this canon in no way applies to the arrangement for hearing arguments in London as provided by the new rules it shews that the convenience of suitors was regarded by Convocation as a matter of first importance.

I was in every way, therefore, bound to use any power I possessed for the relief of the suitors in this matter, and to uphold so far as may be these orders, which have met with so hostile a reception.

The extent of the grievance which they were designed to remove has been forcibly exemplified since the argument in the present case was heard, in the case of a clergyman who was under sentence of suspension from his ministerial functions for a limited period, and who wished to be heard by counsel before the judge for the relaxation of that suspension.

The matter was heard at Westminster under these new rules and orders, and was so extremely simple that its discussion did not last ten minutes. The application failed, and if it had been heard at York, would have cost the defendant, who had to pay the costs of the application on both sides, at least fifty guineas in counsels' fees.

This almost amounts to a denial of justice.

If a reasonable doubt exists (to put the case no higher) whether the powers conferred upon the judge are restricted in the manner contended by Mr. Jeune, the reasons for so construing the Act ought to be cogent indeed before it is held that the judge is powerless to remedy such an evil as this.

The one great blot which has from the earliest times disfigured the common law of England is its slavish subservience, on some occasions, to rules which are merely technical. I have ever thought it a judicial duty to mitigate the severity of technical rules in favour of justice and convenience, where they might be

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relaxed without introducing the opposite evils of looseness and uncertainty in legal proceedings; and it is in this spirit that the rules under consideration have been framed.

Should an appeal be had upon the validity of these orders, I may take any further steps that may be needful, to set before the tribunal of appeal more at large the grounds upon which I conceive that their validity may be supported.

For it is singular, and somewhat unaccountable, that they are likely in the present case to meet with little support from the counsel of either of the parties. Had this boon of reduced expenditure, and increased convenience and despatch, been confined to the parties in this suit, it might have been withdrawn, as they did not care to accept it. But it concerns all suitors in the Court in future, and the reasons in favour of its legal validity ought to be fairly placed before the tribunal of appeal for their consideration and judgment.

The order to be made upon the defendant's present application in the suit must be that his objections are overruled and the articles as they stand admitted to proof. The defendant is to pay the costs of the application.

Proctor for the promoter: *Lawton.*

E. S. R.

IN THE GOODS OF CUBBON. 1886

Will—Married Woman—Realty only disposed of—Appointment of Executors—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75)—*Limited Probate.* *Aug.* 10.

The will of a married woman dealing only with realty, but appointing executors, is entitled to probate where a portion of the estate consists of personalty vested in her by virtue of the Married Women's Property Act, 1882.

ANNE ELIZABETH CUBBON, deceased, the wife of Thomas Cubbon, died on the 16th of April, 1886, leaving a duly executed will by which she bequeathed to her husband a life interest in the rents of certain freehold property in the town of Liverpool of which she was possessed. She also directed that, with the consent of her executors, the property might be sold and the proceeds invested in his and their names jointly, and after his decease, and on her youngest child attaining the age of twenty-one, the amount to be divided among her children. She appointed William Beaty and C. H. Rowe to be her executors, but she gave no directions as to her personal property.

The real property of which she died possessed, and which alone was disposed of by the will, was vested in the deceased by virtue of an indenture of conveyance dated the 15th of January, 1883.

The personal estate of which the deceased died possessed was of the aggregate value of 12*l.* 12*s.* 10*d.*, that is to say, 6*l.* 11*s.* 4*d.* in the Liverpool Savings Bank, rents of her freehold property due but not collected, amounting to 4*l.* 11*s.* 6*d.*, and also the apportionment of accruing rents to the date of her death, amounting to 1*l.* 10*s.*

Crosse, moved for probate. As the conveyance is dated subsequently to the Married Women's Property Act, 1882, it is her separate property, and she has full control over the rents. She is in the position of a feme sole in regard to it. *Brownrigg* v. *Pike* (1) is an authority for the proposition that the will of a feme sole is entitled to probate, even if it only appoints executors, and so is *In the Goods of Tomlinson* (2), though a grant was

(1) 7 P. D. 61. (2) 6 P. D. 209.

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there refused, because the will was made in the execution of a power, which is not the case here.

BUTT, J. As there is personalty I think you are entitled to a grant.

Probate granted, limited to all such personal estate as the deceased was possessed of and entitled to for her separate use.

Solicitors: *C. J. Allen, for Quiggin, Liverpool.*

W. L.

June 7, 8.

[IN THE COURT OF APPEAL.]

THE XANTHO.

Ship—Bill of Lading—Perils of the Sea—Collision—Negligence—Burden of Proof.

In an action against a shipowner for the loss of goods carried under a bill of lading containing the usual exception against perils of the sea, the burden of proof is upon the defendant to bring the case within the exception, and the mere fact that the goods were lost in consequence of a collision between the carrying ship and another is not primâ facie evidence of a loss within the exception, without proof that the collision occurred in such a manner as to be a peril of the sea.

APPEAL from a judgment of the Admiralty Division in favour of the plaintiffs.

The action was brought by the holders of a bill of lading of the cargo lately laden on the *Xantho* for non-delivery of the cargo. At the trial it was admitted that a collision had occurred between the *Xantho* and another vessel by which the *Xantho* had been sunk. The reception of the cargo by the defendants and its non-delivery, and the bill of lading, which contained the usual clause, excepting the shipowners from liability for a loss of the cargo caused by "perils of the sea," were admitted by them. Upon these facts, and on the authority of *Woodley* v. *Michell* (1), the plaintiffs asked for judgment. It was argued for the defendants, first, that the burden of proof which was on them to shew that

(1) 11 Q. B. D. 47.

the loss was caused by "a peril of the sea" within the meaning of that term in the exceptions in the bill of lading had been discharged; and secondly, that the above case was not rightly decided.

The President gave judgment for the plaintiffs, and the defendants appealed.

Sir W. Phillimore, and *Aspinall*, for the defendants. The shipowners are not liable in this action. It is admitted that a collision took place, and a collision is within the excepted perils in the bill of lading, whatever be its cause. Even if it is not so, it is primâ facie an excepted peril: *Lloyd* v. *General Iron Screw Collier Co.* (1); *Grill* v. *General Iron Screw Collier Co.* (2); *Czech* v. *General Steam Navigation Co.* (3); and then the burden of proof is shifted on to the plaintiffs to shew that the collision was caused by negligence in order to take it out of the exception. This burden they have not discharged, and so the defendants are entitled to judgment. *Woodley* v. *Michell* (4) will be relied upon by the plaintiffs, but that case is not good law: *Pickering* v. *Barkley* (5); and so is not a binding authority. But it is also distinguishable, as there must have been negligence to cause the collision in that case, and none has been found here. [They also referred to *The Helene*. (6)]

Myburgh, Q.C. (*Sir C. Russell, A.G.*, and *Hollams*, with him). This case is directly governed by *Woodley* v. *Michell*. (4) This is further shewn by the pleadings and admissions.

The plaintiffs have shewn that the damage was caused by a collision, the burden of proof was therefore thrown on the defendants to prove that the damage was caused by an excepted peril: *Taylor* v. *Liverpool and Great Western Steamship Co.* (7); this they have not done, and therefore judgment was rightly given for the plaintiffs. [He also referred to *The Norway* (8), and *Hayn, Roman & Co.* v. *Culliford*. (9)]

Sir W. Phillimore, in reply.

(1) 3 H. & C. 284.
(2) Law Rep. 3 C. P. 476.
(3) Law Rep. 3 C. P. 14.
(4) 11 Q. B. D. 47.
(5) 2 Roll. Abr. 248, pl. 10.
(6) Br. & L. 429.
(7) Law Rep. 9 Q. B. 546.
(8) 3 Moo. P. C. (N.S.) 245.
(9) 4 C. P. D. 182.

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LORD ESHER, M.R. In this case the plaintiffs shipped certain goods on the *Xantho*, and they have brought an action against the shipowners for not delivering them according to the terms of the bill of lading. The bill of lading was put in evidence at the trial, but the only other fact proved by the admission of either the plaintiffs or the defendants was that a collision had occurred between the *Xantho* and another vessel by which the *Xantho* was sunk and the goods were lost. The learned President gave judgment for the plaintiffs, and the present appeal is brought against that judgment, on the ground that the plaintiffs did not shew that this collision had been caused by the negligence of the defendants' servants. By the contract, of which the bill of lading is evidence, the shipowners bind themselves to deliver the goods in the same condition as that in which they were received, unless they are prevented by one of the excepted perils from so doing. In framing their pleadings the plaintiffs were obliged to aver that the loss was not occasioned by one of these perils. But this is a negative allegation, therefore at the trial it is the usual and the proper course for the plaintiffs simply to prove the delivery of the goods to the shipowners (if she is not, as here, lost), that the ship has arrived, and that the goods have not been delivered. They have then made a case which the shipowners must answer, who must give a good reason for the non-delivery of the goods by shewing that they were prevented from delivering them by one of the excepted perils.

If they can shew a loss or injury by such a peril, then the case is brought within one of the exceptions in the contract and they are not liable to the owners of the goods. It must be borne in mind that the law with regard to bills of lading is not the same as in regard to policies of insurance. In the latter, only the causa proxima is to be looked at, but in a case depending upon the liability under a bill of lading the real and moving cause of the loss has to be sought for. Although therefore the shipowners may have brought themselves within the terms of one of the exceptions, if the plaintiffs' case shews that that which is stated to be the cause was not the real moving cause, but that something else which was not an excepted cause was what caused the loss, as that such moving cause was the

consequence of the negligence of the defendants, then the loss is not occasioned by an excepted peril. Next, suppose that the real moving cause of the loss is not one of the excepted perils, but is caused by the negligence of some person other than a servant of the shipowners. Does the same reasoning apply? Certainly it does, for there is no exception in the bill of lading of a loss caused by the negligence of a third party, and the real cause of the loss has to be sought for, and it is negligence. Such was the effect of our decision in *Woodley* v. *Michell* (1), where we held that if the cause of the loss was the negligence of the crew of either vessel, without the winds or waves or any extraordinary difficulty of navigation contributing to the accident, such a loss, the cause being negligence, did not fall within the exceptions in the bill of lading. It is unnecessary now to say whether a collision caused in any other way is within the excepted perils or not. If a collision were caused without any negligence of anyone, but by the action of a storm or a violent sea, or an unknown current, all of which are perils of the sea, then the mere fact of the proximate cause of the loss being a collision would not prevent it from falling within the excepted perils. There may also, no doubt, be mixed cases, which I will not discuss now, and there may be accidents, which though not caused by negligence are yet not the result of perils of the sea, and there may be cases where a loss has been caused both by negligence and by a peril of the sea. Clearly, however, there are three classes of collisions in which the loss cannot be said to be the result of an excepted peril, viz., where there has been negligence on the part of those in charge of the vessel carrying the goods; where it has been the result solely, without any assistance from the action of winds or waves, of the negligence of another ship; and, lastly, where it has been the result, also without any assistance from winds or waves, of the negligence of both ships. But since a collision is not primâ facie an excepted peril, it is necessary to prove that something which is such is the real cause of the loss. In the present case the plaintiffs have shewn that their goods were shipped under the bill of lading, and it is proved that the vessel

(1) 11 Q. B. D. 47.

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in which they were laden was lost by a collision at sea. A collision is not usually caused by the action of the winds and waves alone, in nine cases out of ten a collision is the result of negligence, therefore the plaintiffs made out a primâ facie case against the defendants to which the latter have given no such answer as will bring them within the exceptions in the bill of lading, and will absolve them from their liability. In *The Norway* (1) and other cases to which we have been referred, there was evidence that the loss was occasioned by an excepted peril. If the defendants prove that, then the burden of proof lies on the plaintiffs to shew that the real cause is the negligence of some one. In *The Hélène* (2) it was proved that the immediate cause of the loss was leakage, but evidence was there given to shew that the real cause was negligence. So in *The Norway* (1) it was proved that the goods were thrown overboard under circumstances which would, if nothing else had occurred, have made it a proper jettison. But it was proved further that the reason why this had to be done was because there had been negligence by the master and crew in the navigation of the ship. The case of *Taylor* v. *Liverpool and Great Western Steamship Co.* (3) is a further authority in favour of the opinion I have expressed. In the present case the defendants ran their case too fine by merely shewing that there had been a collision, and, apart from the authority of *Woodley* v. *Michell* (4), they have not shewn such an absence of negligence as entitles them to our judgment. The appeal must therefore be dismissed, with costs.

BOWEN, L.J. I am of the same opinion. In this case the burden rests on the shipowners to prove that the loss of the plaintiffs' goods is within one of the exceptions in the bill of lading. It was argued for the defendants that the owners of the goods had admitted enough to shift the burden of proof, for they have admitted that there was a loss by collision. First, it was said that by admitting that there was a collision the plaintiffs admitted that which is necessarily a peril of the sea.

(1) 3 Moo. P. C. (N.S.) 245.
(2) Br. & L. 429.
(3) Law Rep. 9 Q. B. 546.
(4) 11 Q. B. D. 47.

Secondly, that even if the collision does not necessarily amount to a peril of the sea, it is at any rate when unexplained primâ facie an excepted peril, and throws the burden on the other side of proving that in the particular instance the collision was not a peril of the sea, a burden which it was contended the plaintiffs had not discharged.

With regard to the first proposition, is a collision necessarily a peril of the sea? We must be careful to distinguish the meaning to be attached to words like "perils of the sea," when we are dealing with contracts of carriage between shipowners and shippers, and in policies of insurance between underwriters and assured. Considering now the first kind of contract, it is obvious that there may be a collision caused by the negligence of the carrying ship alone. There may be one caused by the negligence of another ship alone. There may be also one caused by negligence on both sides and not contributed to by the action of winds or waves. But it was held in *Woodley* v. *Michell* (1) that where there was no possibility that the accident arose from the action in any degree of the elements, and where the facts tended to the conclusion that the other ship was in fault, the collision was not a peril of the sea; by that decision we are bound. After that decision it is impossible to adopt the proposition that collision is necessarily a peril of the sea. As to the second proposition—that the plaintiffs having admitted a collision the burden of proof has been transferred from the defendants to them—the shipowner, in my opinion, has to prove that the accident is within the exception in the bill of lading. Collision is a general term, and we cannot infer that it has occurred in such a manner that it amounts to a peril of the sea. The case of *Woodley* v. *Michell* (1), for example, shews that there may be a collision without a peril of the sea. The second class of cases in which there may be negligence on the part of one or both of the ships, and also a contribution to the accident by the force of winds or waves, I will not now discuss. But because we are told that a collision has occurred, we cannot infer that it is a peril of the sea. The result of *Woodley* v. *Michell* (1) is correctly stated in the head-note, and does not go further than that; the burden of proof in this case still remains

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on the shipowners, and since they have not displaced it our judgment must be for the plaintiffs.

FRY, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Lowless & Co.*

E. S. R.

April 14.

[IN THE COURT OF APPEAL.]

THORNTON *v.* THORNTON.

Divorce—Concurrent Suits, Suits in England and India—Stay of Proceedings.

The wife of an officer in the Indian army stationed at Bombay went over to England with his approbation, and within two months he commenced proceedings in the Bombay Court for dissolution of the marriage on the ground of adultery alleged to have been committed by her in India. The petition was served on her in England, and two days afterwards she commenced a suit for restitution of conjugal rights against her husband, who was then in England on short leave, and was to start for Bombay within a fortnight:—

Held, by the Court of Appeal, affirming the judgment of Butt, J., that the proceedings in the wife's suit ought not to be stayed till after the determination of the proceedings in the husband's suit at Bombay.

APPEAL against an order of Butt, J., refusing to stay proceedings in the action (which was a petition for restitution of conjugal rights) until the determination of a suit by the husband in India for the dissolution of the marriage.

The husband was an officer in the Indian army, and the marriage took place in India in 1879. In December, 1885, circumstances came to the knowledge of the husband which led him to the conclusion that the wife had been guilty of adultery in India. On the 25th of December she left for England with the approbation of her husband. There was contradictory evidence as to whether she left of her own free will. In February, 1886, the husband presented a petition in the High Court of Judicature at Bombay against his wife and the alleged adulterer for dissolution of the marriage, and an order was made directing an officer of the Court to transmit the summons in that suit with a

copy of the petition to England for service on the wife, and it appeared that she was served with these documents on the 25th of March. On the 27th of March the present suit was commenced.

The husband was at that time in England, having left India on the 27th of February on sixty days leave of absence to make arrangements as to the residence in England of his two children, and he was obliged to leave England on the 9th of April to return to India. The co-respondent was an officer resident in India, and the husband deposed that all the witnesses whom he should have to call were resident in India. Their evidence it appeared was to corroborate a confession made by the wife on which the husband mainly relied.

On the 14th of April, 1886, Butt, J., dismissed an application that all proceedings in the wife's suit might be stayed pending the determination of the proceedings in the husband's suit at Bombay. The husband appealed.

Inderwick, Q.C., and *Bargrave Deane*, for the appellant. It is unreasonable that there should be a double litigation on the same matter. The husband institutes proceedings which if successful will give him complete relief. The wife, after the commencement of those proceedings, commences another proceeding which cannot operate as a substitute for his, since if he proves adultery in her suit this will only defeat her proceeding, but will not enable him to obtain a divorce. The husband is willing to undertake to prosecute his suit with all reasonable dispatch, and to submit to an immediate decree for restitution of conjugal rights if he fails in it. Butt, J., was of opinion that as all the parties were here the English suit ought to be allowed to go on. This was a misapprehension, for no one but the wife is here.

Bayford, Q.C., and *Searle*, for the wife. It is open to question whether the Bombay Court has any jurisdiction over the wife who is residing in England. The jurisdiction depends on Acts of the Governor General in Council. The Act governing matrimonial suits in India is the Indian Divorce Act of 1869, which extends to India the principal provisions of the English statutes relating to divorce. By s. 45 of that Act the proceedings are to be regu-

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lated by the Code of Civil Procedure. The Code of Civil Procedure, 1882, provides by s. 17 that a suit may be instituted in a court within the local limits of whose jurisdiction the cause of action arises, and by s. 89 provision is made for service on a defendant who resides out of British India. Whether this clause contained in an Indian Act and not sanctioned by any enactment of the British legislature will give the Court in Bombay jurisdiction, so that it can make a valid decree of dissolution against a wife not resident in India, may be questioned. But apart from this, the wife should not be deprived of her right to litigate the question of adultery in the suit which she has duly instituted here. As regards the offer which is made, a decree by consent for restitution of conjugal rights would place the wife in a less advantageous position than if she obtained a decree adversely, for if she were hereafter to be able to prove adultery, this if the husband should not obey the decree for restitution would enable her to sue for dissolution on the ground of adultery and desertion, which would not be the case if a decree were taken by consent, as that would indicate collusion. It will be a great hardship on the wife to be examined on commission here, and have to tell her story before any witnesses are called on the other side, or to go to India to be examined there. Suppose the two suits proceed, and the husband succeeds in India and the wife in England, there will be serious difficulties. The jurisdiction of the English Court is undoubted, but whether the judgment in India, which derives its effect only from a statute of the Indian legislature, and not from any statute of the United Kingdom, is binding here, is a question. The parties might be in the position similar to that in which parties have been where a Frenchman married an English woman here, without complying with all the requisitions of French law, and they were held husband and wife here, but not in France. The wife does not wish the question of adultery to be tried twice over, but after the wife has come here with the consent, if not under the authority of her husband, she ought not to be restrained from having the question tried here.

Inderwick, in reply. The Indian Divorce Act was passed for the benefit of persons in the position of the husband in the present case.

[COTTON, L.J. :—Our present opinion is that there is jurisdiction to try the case in India. The question is whether we ought to interfere with the wife's right to have the point tried here in a suit which she has instituted.]

The wife could go to India, her husband would have to pay the expenses, and as she has sisters married and living there she could go without inconvenience. Justice cannot be fully done here, for a divorce cannot be obtained in the present English suit. It would be oppression to be obliged to have the issue of adultery tried here and then over again in India. The question is one of convenience. In one case the wife would go to India, having her expenses paid; in the other, the husband would have to contest the case twice over.

COTTON, L.J. This is a case of some nicety. The husband commenced in India a suit for dissolution of marriage against his wife and the co-respondent. Before that suit was commenced she had come over to England, and I need not enter into the question whether she was sent here or came of her own accord. When her husband accidentally came over to England for a short time, she commenced proceedings for restitution of conjugal rights. Thus two actions are going on, each of which, according to my present opinion, is in a Court which has jurisdiction over the matter. The husband being here, the wife files this petition for restitution of conjugal rights in the Court of Divorce, which, as he was present here, had jurisdiction over him; and he had commenced proceedings in a Court which, as far as I can see, had jurisdiction over her, notwithstanding her having gone abroad before it was commenced. In that state of things the husband asks that, as his defence to the suit for restitution of conjugal rights is the adultery of his wife, which is his ground of action in India, the proceedings in England on the petition of the wife should be stayed until the question of adultery has been decided, not only as against her, but as against the co-respondent in that suit in India. Undoubtedly there would be certain advantages in taking that course. A trial in India would be effectual, not only as against the wife, but as against the co-respondent; the case would be tried in a place where all the witnesses except the wife

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are now resident. And certainly if we could avoid it we should not wish to allow the husband to be put to the expense of proving the adultery of the wife in England as well as in India, especially where the witnesses are in India. But what we have to consider is, whether we can deprive the wife of her right to have the questions which arise in a suit duly instituted by her in an English Court having jurisdiction over the case, decided in England, and compel her to have that tried somewhere else. I think that it would not be right for us to do so. She says: "There is some evidence by the husband that I made to him a confession of adultery. I deny that in fact I had committed adultery, and I wish to have that question tried. I wish to be able, without going to India, to give in Court my explanation of the circumstances relied upon by my husband, and to defend myself by giving evidence that I never have in fact committed adultery." She wishes (and her wish is not unnatural, nor do I think it can be said to be unreasonable) to give her evidence in England rather than go over to India in order to give it there. I think that, notwithstanding the inconvenience and expense to which the husband must be put if both actions are allowed to go on, we ought not to prevent the wife from going into this question here, nor put her upon the terms of her action being stayed until the action in India is decided. The appeal must therefore fail.

BOWEN, L.J. I am of the same opinion. The decision comes in the end to rest upon a very small point. The wife, primâ facie, has a right to prosecute her suit here. She thinks she has an advantage in doing so—she thinks it is for her benefit that the question as to her adultery should be tried in England. I can conceive that this is not an unreasonable view if she is an innocent woman. Even if she is guilty, she may not unreasonably hope to escape more easily in England than in India. Ought we, then, to interfere with the natural course of this suit which she has a right to prosecute here, by making an order in it which in the result might possibly transfer the decision of the question of her adultery from this English Court to an Anglo-Indian Court. I do not say that we could not do so if we saw clearly that the ends of justice required it—if we saw clearly that it would be

oppression or waste or vexation for her to proceed with her suit; but I think we ought not to interfere in such a way unless it is very clear that we could not do any harm by the interference, and I do not think the case has been made clear to us here to that extent.

FRY, L.J. I am also, but not without regret, of the same opinion.

Appeal dismissed.

Solicitor for wife: *W. Horsley.*
Solicitors for husband: *Godden, Holme, & Co.*

H. C. J.

RULES OF THE CHANCERY COURT OF YORK

of September, 1885.

WHEREAS by an Act passed in the Session of Parliament held in the third and fourth years of Her Majesty Queen Victoria intituled an "Act for the better enforcing Church Discipline," it is amongst other things enacted that in proceedings taken under the authority of the Act the Bishop may, if he shall think fit, send the case by Letters of Request to the Court of Appeal of the Province to be there heard and determined according to the law and practice of such Court: "Provided always that the Judge of the said Court may, and he is hereby authorized and empowered, from time to time to make any Order or Orders of Court for the purpose of expediting such suits or otherwise improving the practice of the said Court." AND WHEREAS it appears to me, THE RIGHT HONOURABLE JAMES PLAISTED, BARON PENZANCE, the duly constituted Judge of the Provincial Court of Appeal for the Province of York, that the practice of the said Court would be improved and suits expedited if the under written Orders were made and applied in all suits sent by the Bishop to the said Court by letters of request whether such suits be commenced in future or be already commenced in the said Court, I, THE RIGHT HONOURABLE JAMES PLAISTED, BARON PENZANCE, as such Judge as aforesaid, and by authority of the said Statute and of all or any other powers me thereto enabling, do make the Order or Orders following:—

1°. In case of alleged disobedience to any Monition issued by the said Court the party complaining thereof, or his proctor or solicitor, shall serve upon the defendant or respondent personally (or by any form of substituted service which shall have been specially ordered by the Court upon cause shewn) a statement in writing of the particular facts or conduct of the defendant or

respondent, which are charged as constituting disobedience to the Monition, with positive averments of time and place, and shall add thereto a notice in writing to the defendant or respondent that on the Court day which shall happen next after the expiration of fourteen clear days from the time of such service he will apply to the Court to enforce obedience to the Monition.

2°. Such statement and notice shall be accompanied with copies of one or more affidavits in proof of the same, and a copy of such statement and affidavits, together with an affidavit certifying that the same have been duly served on the defendant or respondent shall be deposited by the said party complaining in the registry of the Court.

3°. If the defendant or respondent desires to contest such application as aforesaid he must tender to the Court on the said Court day a statement in writing of the facts, if any, which he disputes, together with an affidavit or affidavits in support of such dispute, and the grounds, if any, upon which he opposes the making of any Order for enforcing obedience as aforesaid, and prepare and give a copy thereof to the party complaining his proctor or solicitor. If the defendant or respondent has not previously appeared in the suit he must enter an appearance in the suit either personally or by his proctor or solicitor in the usual way, before such statement aforesaid can be received by the Court, and he can be allowed to contest the making of any such Order as aforesaid.

4°. The Judge, after considering the statement and affidavits of the party complaining, and the counter-statement, if any, of the respondent or defendant, will make, or his surrogate acting under his directions will make, such order as may be needful, if any, for the determination of any matters of law or fact which have been raised and which in the opinion of the Judge require to be determined, or in the absence of any such matters will dispose of the case as justice and the law and practice of the Court may require.

5°. In case of alleged disobedience to any decree or order of suspension made or issued by the Court, a course similar to the foregoing is to be followed.

6°. The above Rules and Orders shall not apply to the case of any disobedience occurring before the issuing or making thereof.

7°. In respect of any matter not provided for by these Rules or

Orders, or in case of any difficulty arising with regard to the application or interpretation thereof, application must be made to the Court.

Dated this twenty-fourth day of September, 1885.

PENZANCE.

RULES OF THE CHANCERY COURT OF YORK *of May*, 1886.

WHEREAS, by an Act passed in the Session of Parliament held in the third and fourth years of Her Majesty Queen Victoria, intituled an "Act for the better enforcing Church Discipline," it is amongst other things enacted that in proceedings taken under the authority of the Act the Bishop may if he shall think fit send the case by Letters of Request to the Court of Appeal of the Province, to be there heard and determined according to the law and practice of such Court: "Provided always, that the Judge of the said Court may and he is hereby authorized and empowered from time to time to make any Order or Orders of Court for the purpose of expediting such suits or otherwise improving the practice of the said Court." AND WHEREAS it appears to me, THE RIGHT HONOURABLE JAMES PLAISTED, BARON PENZANCE, the duly constituted Judge of the Provincial Court of Appeal for the Province of York, that the practice of the said Court would be improved and suits expedited if the under written Orders were made and applied in all suits sent by the Bishop to the said Court by Letters of Request, whether such suits be commenced in future or be already commenced in the said Court.

AND WHEREAS by the Public Worship Regulation Act it was provided that the Office of Official Principal in the two Provinces of Canterbury and York respectively should be held by the same Judge, and in all proceedings taken under that Act provision was made for the holding of sittings for the trial of cases arising in the Northern Province at London or Westminster, and it is desirable and convenient to extend so far as may be a similar practice to all other cases arising in the Northern Province, I, THE RIGHT HONOURABLE JAMES PLAISTED, BARON PENZANCE,

as such Judge as aforesaid, and by authority of the said Statute, and of all and any other powers me thereto enabling do make the Order or Orders following:—

1. That from and after the making of this Order, in all suits now pending, or in future to be instituted in the Chancery Court of York, all hearings of causes involving only the discussion of legal questions or questions of fact arising on affidavits or other written testimony, and the argument of all points of law and interlocutory applications, to the Court or Judge, shall, if so directed by the Judge, take place in London, including Westminster, at such time and place as the Judge shall appoint, but that all Judgments shall be delivered, and all sentences pronounced, and all final Orders and Decrees of the Court, including Interlocutory Decrees having the force and effect of a definitive Sentence in writing, and all Decrees or Orders whatsoever for the infliction of Ecclesiastical censure, or the signifying of disobedience to the Court of Chancery, shall be pronounced, made and issued in the Court at York in manner and form as heretofore accustomed.

2. In respect of any matter not provided for by these Rules or Orders, or in case of any difficulty or question arising with regard to the application or interpretation thereof, the Judge will on application made to him make such Order as may be required.

Dated this twenty-seventh day of May, 1886.

PENZANCE.

END OF VOL. XI.

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DOMICIL—Colony—Divorce—Validity of marriage - - - - - 128
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FOREIGN LAW—*Husband and Wife—Marriage—Presumption of Domicil—Irish Marriage dissolved by a Colonial Court—Roman-Dutch Law—Subsequent Marriage in England—Validity—Legitimacy Declaration Act*, 1858 (21 & 22 *Vict. c.* 93).] A. and B., both having an Irish domicil, were lawfully married in Ireland, and resided in Ireland for a year after their marriage. They subsequently went to an English colony, where the husband was engaged in various pursuits, abandoned all idea of returning home, and visited England only for short periods and for temporary purposes. In the fifth year of cohabitation B. committed adultery with S., whose domicil was English, and in a suit instituted by A. in the colonial court—in which all the parties were represented—a decree was pronounced dissolving the marriage.—B. and S. shortly afterwards returned to England, where they went through the form of a marriage according to law.—*Held*, first, that it must be taken that A. was domiciled in the colony and that the divorce was valid; secondly, that the marriage between B. and S. was valid, for although the law prevailing in the colony prohibited the re-marriage of a guilty party as long as the innocent party remained unmarried, yet as the colonial divorce operated to annul the existing marriage and to restore the parties to the position of unmarried persons, they were free to remove from the jurisdiction and to contract a fresh marriage according to the law of this country. Scott *v.* Her Majesty's Attorney General - - - - - 128

—— Colony—Concurrent suits in England and India—Stay of proceedings - 176
See Divorce.

INJUNCTION—Divorce—Husband removing property out of jurisdiction - - 11
See Alimony

JUDICIAL SEPARATION—Cruelty—Harsh conduct without actual violence - 141
See Cruelty.

—— Neglect to comply with decree of restitution - - - - - 111
See Decree. 2.

MAINTENANCE—Divorce—Neglect to execute deed - - - - - 68
See Decree. 3.

NULLITY OF MARRIAGE—*Provision for Children—Postponement of making Decree Absolute*—20 & 21 *Vict. c.* 85, *s.* 35—22 & 23 *Vict. c.* 61, *s.* 4—23 & 24 *Vict. c.* 144, *s.* 7—29 *Vict. c.* 32, *s.* 3—36 *Vict. c.* 31, *s.* 1.] A decree nisi was made declaring a de facto marriage void, as not having been solemnized according to law. Shortly before the expiration of the period of six months, a petition was presented for a provision for the child of the marriage. On a motion to make the decree absolute, Butt, J., held that a provision for the child ought to be inserted in the final decree, and refused to make the decree absolute until materials were furnished for deciding what provision ought to be made:—*Held*, by the Court of Appeal, that under 23 & 24 Vict. c. 144, s. 7, there is no absolute right to have a decree made absolute at the end of the six months, and that although the judge might have made a provision after the decree absolute, he had jurisdiction to suspend the making the decree absolute for the purpose of inserting in it the provision which he considered necessary, and the Court would not interfere with his discretion, there being nothing to shew that he had exercised it unreasonably.—The Act 20 & 21 Vict. c. 85, s. 35, enables the Court to order a provision to be made for the children of a marriage which the Court has declared to be void. Langworthy *v.* Langworthy [C. A. 85

PRACTICE—*Stay of Proceedings—Concurrent Suits, Suits in England and India.*] The wife of an officer in the Indian army stationed at Bombay went over to England with his approbation, and within two months he commenced proceedings in the Bombay Court for dissolution of the marriage on the ground of adultery alleged to have been committed by her in India. The petition was served on her in England, and two days afterwards she commenced a suit for restitution of conjugal rights against her husband, who was then in England on short leave, and was to start for Bombay within a fortnight:—*Held*, by the Court of Appeal, affirming the judgment of Butt, J., that the proceedings in the wife's suit ought not to be stayed till after the determination of the proceedings in the husband's suit at Bombay. Thornton *v.* Thornton - C. A. 176

—— Contempt—Publication of advertisements
See Contempt. [66

—— Divorce—Execution of deed by person nominated by the Court - - 95
See Decree. 4.

—— Divorce—Injunction—Husband removing property out of jurisdiction - 11
See Alimony.

PRACTICE—*continued.*
—— Divorce—Revivor—Death of petitioner after decree nisi and before decree absolute *See* DECREE. [103
—— Settlements—Variation of - - 84 *See* SETTLEMENTS.

QUEEN'S PROCTOR—*Decree Nisi—Intervention to disprove the Adultery—Fresh material Facts—Pleadings*—23 & 24 *Vict. c.* 144, s. 17.] The Queen's Proctor may intervene to shew cause why a decree nisi should not be made absolute on the ground that the charge of adultery on which it was granted was not true, and he is at liberty to adduce evidence of fresh material facts for that purpose.—In such an intervention it is sufficient for the Queen's Proctor to plead that the decree was obtained contrary to the justice of the case by reason of material facts not having been brought to the knowledge of the Court. CRAWFORD *v.* CRAWFORD - - - 150

REVIVOR—Divorce—Death of petitioner after decree nisi and before decree absolute *See* DECREE. [103

RESTITUTION - - - - 111 *See* DECREE. 2.

SERVICE SUBSTITUTED—Divorce—Motion—Practice - - - - 95 *See* DECREE. 4.

SETTLEMENTS—*Variation of—Divorce.*] Upon application to vary a marriage settlement after a decree for divorce on the husband's petition, it appeared that the wife's income under the settlement amounted to £1050 a year. The husband possessed an income of about £600 a year, part of which arose from money received from the respondent. There were no children of the marriage.—The Court varied the trusts of the settlement by ordering the trustees to pay the husband £300 a year during the joint lives of husband and wife. FARRINGTON *v.* FARRINGTON - 84

SETTLEMENTS—*continued.*

STATUTES:—
20 & 21 Vict. c. 85, s. 35 - - - 85 *See* NULLITY.
21 & 22 Vict. c. 93 - - - - 128 *See* FOREIGN LAW.
22 & 23 Vict. c. 61, s. 4 - - - 85 *See* NULLITY.
23 & 24 Vict. c. 144, s. 7 - - - 85 *See* NULLITY.
—— —— s. 17 - - - - 150 *See* QUEEN'S PROCTOR.
29 Vict. c. 32, s. 3 - - - 85 *See* NULLITY.
36 Vict. c. 31, s. 1 - - - 85 *See* NULLITY.
47 & 48 Vict. c. 61, s. 14 - - - 95 *See* DECREE.
—— —— —— - - - - 68 *See* DECREE. 3.
47 & 48 Vict. c. 68, s. 5 - - - 111 *See* DECREE. 2.

STAY OF PROCEEDINGS—Divorce—Concurrent proceedings - - - - 176 *See* PRACTICE.

ADMIRALTY.

AMENDMENT—Preliminary act - - 20 *See* PRACTICE.

APPEAL—Investigation into shipping casualty—Refusal of Board of Trade to order re-hearing—Appeal - - - 37 *See* BOARD OF TRADE.

ARREST—Sale of foreign ship—Report of master *See* PRACTICE. 2. [10
—— Bail—Sale—Marshal's fees—Mortgagees 17 *See* PRACTICE. 3.

BAIL BOND—Action of restraint—Liberty to dispute plaintiff's title - - - 92 *See* CO-OWNERSHIP.

BOARD OF TRADE—*Shipping Casualty—Inquiry—Re-hearing—Shipping Casualties Investigation Act*, 1879 (42 *& 43 Vict. c.* 72), *s.* 2, *sub-ss.* 1, 2.] A refusal by the Board of Trade to grant a re-hearing of an investigation into the conduct of a certificated officer, is not a decision within 42 & 43 Vict. c. 72, s. 2, sub-s. 2, and therefore no appeal lies from it to the Admiralty Division of the High Court. THE IDA - - 37

CARDIFF—Sailing rules—Entrance to docks—"Narrow channel" - - 117 *See* COLLISION. 5.

CASES—*Bellcairn, The* (10 P. D. 161), distinguished - - - - 40 *See* PRACTICE. 5.
—— *Dordogne, The* (10 P. D. 6), commented on *See* COLLISION. 7. [25
—— *Franconia, The* (2 P. D. 8), approved 132 *See* COLLISION. 8.
—— *India, The* (1 W. Rob. 406), followed 3 *See* SALVAGE.
—— *Loch Libo, The* (3 W. Rob. 310), approved *See* COLLISION. 4. [34
—— *Mary Ann, The* (1 Ad. & Ecc. 8), followed *See* MASTER. [120
—— *Thorogood* v. *Bryan* (8 C. B. 115), followed *See* COLLISION. 7. [31

CHARTERPARTY—Charterer to provide coals—Coals ordered by master—Liability of owner - - - - - 21 *See* MASTER. 2.

COLLISION—*Ship at Anchor—Burden of Proof—Practice—Appeal to House of Lords—Stay of Execution.*] In an action founded upon a collision between a vessel at anchor and one in motion, the burden of proof is upon the owners of the latter to prove that the collision was not occasioned by any negligence on their part.—When an appeal is brought from the Court of Appeal to

COLLISION—*continued.*
the House of Lords in an Admiralty action, in which bail has been given by the parties, an application by the appellant to stay execution pending the appeal will not be granted, unless special circumstances are shewn by affidavit. The Annot Lyle - - - C. A. 114

2. —— *Bill of Lading—Perils of the Sea—Negligence—Burden of Proof.*] In an action against a shipowner for the loss of goods carried under a bill of lading containing the usual exception against perils of the sea, the burden of proof is upon the defendant to bring the case within the exception, and the mere fact that the goods were lost in consequence of a collision between the carrying ship and another is not primâ facie evidence of a loss within the exception, without proof that the collision occurred in such a manner as to be a peril of the sea. The Xantho [C. A. 170

3. —— *Costs—Inevitable Accident—Admission in Pleadings.*] The plaintiffs in an action for damage by collision admitted on the pleadings that the collision was the result of an inevitable accident:—*Held*, that the defendants were entitled to judgment with costs.—*Held* also, that unless there are special circumstances to induce the Court to depart from this rule, costs will be given against the plaintiffs in an action of damage, whenever the defendants prove that the collision is the result of an inevitable accident. The Naples - - - - - 124

4. —— *Improper Navigation — Compulsory Pilotage—Responsibility of Pilot for getting under Way—Suggestions by Master.*] Where a vessel is in charge of a pilot by compulsion of law, there is no duty on the master to prevent her from being got under way in obedience to an order of the pilot, unless such a proceeding is manifestly dangerous.—The defendants' vessel was compulsorily in charge of a duly licensed pilot, and was got under way when the weather was thick and hazy, but vessels could be seen at 300 yards distance:—*Held*, that the defendants were not responsible for damage caused by the vessel being under way.—While the defendants' vessel was approaching that of the plaintiffs, the master expressed his opinion that her helm should be starboarded. The pilot gave the order, and in consequence of it a collision occurred.—*Held*, that the defendants were not responsible for the damage caused by the collision.—*The Loch Libo* (3 W. Rob. 310) approved. The Oakfield 34

5. —— *Sailing Rules—Regulations for Preventing Collisions at Sea, Arts.* 16, 21, 22—*Cardiff Docks Entrance.*] A collision occurred at the junction of the main channel leading to Cardiff Docks and the channel to the Roath Basin, between a steamer going up the former and another coming down the latter:—*Held*, that the place of the collision was a "narrow channel" within art. 21 of the Regulations for Preventing Collisions at Sea, and that arts. 16 and 22 were also applicable, there being no special or local rules to supersede the general rules of navigation. The Leverington - - - - C. A. 117

7. —— *Damages for Loss of Life—Improper Navigation—Both Ships to blame—Lord Campbell's Act* (9 & 10 *Vict. c.* 93), *s.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.] A collision having occurred through the fault of both vessels, three persons on board one of them, an engineer and a passenger who had nothing to do with the navigation, and an officer who was responsible for it, were drowned:—*Held*, following *Thorogood* v. *Bryan* (8 C. B. 115), that an action in personam could not be maintained by the representatives of the deceased persons against the owners of the other vessel, and that the Judicature Act, 1873, s. 25, sub-s. 9, did not apply. The Bernina - - - - - 31

7. —— *Sailing Rules—Fog—Moderate Speed—Regulations for Preventing Collisions at Sea, Arts.* 13, 18.] The plaintiffs' steamer, in a fog off Cromer, heard a whistle almost right ahead; she was then going slowly, about three knots an hour, and she continued at this speed for about a minute, until a second whistle was heard, when the order was given to stop and reverse; but the defendants' steamer coming into sight, a collision occurred. The defendants admitted at the trial that they were to blame:—*Held*, by the Court of Appeal, affirming the Admiralty Division, that the plaintiffs were also to blame, for they had infringed art. 18 by going on at the same speed after they heard the first whistle as before.—By Lord Esher, M.R. If an officer in charge of a vessel in a fog hears a whistle ahead, he must act sooner than if it is heard from any other quarter, and on the probability that the vessel which is sounding the whistle is coming towards him. The officer in charge of the plaintiffs' steamer on hearing the first whistle should have reduced her speed to as slow a rate as possible, only keeping her under command; by omitting to do so he had not gone at a "moderate" speed within the meaning of art. 13, and had also infringed art. 18.—*The Dordogne* (10 P. D. 6) commented on. The Ebor - - - - - C. A. 25

8. —— *Sailing Rules—Regulations for Preventing Collisions at Sea, Arts.* 11, 20.] A ship is "being overtaken" within the meaning of art. 11 when another is going faster than, and is coming nearer to her, on a course which may ultimately lead to a position of danger, and when the following ship is within the space not covered by the lights of the first ship, and is thus in a position in which these lights cannot be seen by those on board the following ship.—The light prescribed in art. 11 must be shewn within a reasonable time before the overtaking ship gets into a position of danger, and after the overtaken ship has become aware that the overtaking ship is approaching in the manner before stated.—*The Franconia* (2 P. D. 8) approved. The Main [C. A. 132

9. —— *Sailing Rules—River Tyne—Compulsory Pilotage—Tyne Pilotage Order Confirmation Act*, 1865 (28 *Vict. c.* 44), *sched., ss.* 10, 11, 12, 16—41 *Geo.* 3, *c. lxxxvi.—Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 39.] The provisional order forming the schedule to the Tyne Pilotage Order Confirmation Act, 1865, contains a complete code of regulations respecting pilotage in the River Tyne, and its provisions supersede those of 41 Geo. 3, c. lxxxvi. Therefore under s. 16 of

COLLISION—*continued.*
the schedule, pilotage is not compulsory in the case of either British or foreign vessels in the Tyne. The Johann Sverdrup - - 49

10. —— *Sailing Rules—Bye-laws for the Regulation of the River Tyne*, 1884—*Bye-law* 20.] A collision occurred between the *S.*, which was leaving the Tyne, and the *H.*, which was entering it, about two cables length outside the south pier, and to the south of the line of mid-channel. The *H.* at the time of the collision was proceeding to get from the south of the line of mid-channel to the north of the line, to proceed up the river on the north side:—*Held*, that the *H.* was to blame, as she had infringed bye-law 20 of the Regulations of the River Tyne, 1884, the meaning of which is that a vessel is not to cross from north to south or south to north close up to the pier-heads, but is to get on a proper course when at some considerable distance outside the pierheads. The Harvest - - - - - 14

11. —— *Sailing Rules—Bye-laws for the Regulation of the River Tyne*, 1884—*Bye-law* 20.] Bye-law 20 of the Regulations of the River Tyne, 1884, must be taken to mean that a vessel is not to cross from north to south, or from south to north, close up to the pierheads, but is to get on a proper course when at some considerable distance outside the pierheads. The Harvest [C. A. 90

CO-OWNERSHIP—*Action of Restraint—Bail Bond.*] Where the defendants in an action of restraint have given a bond for the safe return of the ship they are still at liberty to dispute the plaintiffs' right to bring the action, and the Court, if satisfied that the plaintiffs have no such right, will set aside the bond. The Keroula 92

CROWN—Limitation of liability—Right to claim against fund in Court - - 72
See Limitation of Liability.

COSTS—Inevitable accident—Admission in pleadings - - - - - 124
See Collision. 3.

—— Sale—Marshal's fees—Necessaries—Intervention by mortgagee - - 17
See Practice. 3.

DISBURSEMENTS—Master of ship—Lien 120
See Master.

DISCONTINUANCE—Admiralty—Consent order—Release of action - - 40
See Practice. 5.

EVIDENCE — Collision — Charterparty — Excepted perils - - - 170
See Collision. 2.

—— Ship at anchor—Burden of proof - 114
See Collision.

—— Both ships to blame—Compensation under Lord Campbell's Act - - 31
See Collision. 7.

FOREIGN SHIP—Arrest—Sale—Report of marshal - - - - - 10
See Practice. 2.

HOUSE OF LORDS—Appeal—Admiralty—Stay of execution - - - - 114
See Collision.

JURY—Trial—Disbursements - - 6
See Practice. 4.

LIEN—Master of ship—Disbursements - 120
See Master.

LIMITATION OF LIABILITY—*Claim against Fund in Court—Right of the Crown—Time—Laches—Admiralty Suits Act*, 1868 (31 & 32 *Vict. c.* 78), *s.* 3.] The Crown may claim against a fund paid into Court by the owners of a ship in order to limit their liability under the Merchant Shipping Acts, 1854 and 1862, by the general law, and also under the Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 3.—A claim against a fund paid into court in a suit for limitation of liability under the Merchant Shipping Acts, 1854 and 1862, is not necessarily excluded by the fact that the time fixed by the order of the Court for entering claims has elapsed. The Zoe - 72

—— Claim against fund in court—Agreement for discontinuance—Release of action 40
See Practice. 5.

MASTER—*Disbursements—Maritime Lien—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 10.] Under the Admiralty Court Act, 1861, s. 6, the master of a ship has a maritime lien on it for disbursements, and his claim has priority over that of a purchaser.—*The Mary Ann* (1 A. & E. 8) followed. The Ringdove - - - 120

2. —— *Disbursements—Charterparty—Necessaries—Charterer—Owners—Authority of Master—Double Pay*—17 & 18 *Vict. c.* 104, *s.* 187.] By charterparty it was agreed that the owners of the ship should provide and pay for provisions and wages, and that the charterer should provide and pay for coals and other expenses. The master was to be appointed by and was to follow the instructions of the charterer.—The master, with notice of the charterparty, ordered and made himself liable for provisions and coals for the vessel at a foreign port. These provisions and coals were necessary to enable the vessel to perform her voyage:—*Held*, in an action by the master against the vessel, that he was entitled to recover for the provisions but not for the coals, as by the terms of the charterparty he had no power to pledge the owner's credit in respect of them. The Turgot - 21

NECESSARIES—Charterparty—Charterer to provide coals—Liability of owner - 21
See Master. 2.

—— Sale of ship—Costs of marshal—Intervention of mortgagee - - - 17
See Practice. 3.

PILOTAGE—Compulsory—River Tyne - 49
See Collision. 9.

PLEADING — Admiralty — Admission — Inevitable accident—Costs - - 124
See Collision. 3.

PRACTICE—*Rules of Supreme Court, Order XIX., r. 28—Preliminary Act—Amendment.*] Art. IX. of the preliminary act on behalf of the defendants was ordered to be amended, as it did not contain a proper statement of the distance and bearing of the other vessel in accordance with Order XIX., r. 28 (i). The Godiva - - - 20

2. —— *Arrest — Sale of Foreign Ship — Order L., r. 2.*] The Court ordered the sale of a foreign ship on the report of the marshal that it was desirable she should be sold, and subject to the filing of an affidavit, verifying the cause of action and stating that no appearance had been entered. The Hercules - - - 10

3. —— *Arrest—Bail—Sale—Marshal's Fees—Mortgagees.*] The C. was arrested in an action for necessaries supplied by the plaintiff. The owners appeared but did not give bail or deliver pleadings. The mortgagees of the C. intervened, and took possession under the mortgage, but the C. still remained in the custody of the marshal, and was subsequently sold by him under an order of the Court obtained by the interveners. Judgment with costs, by consent, for the interveners, was afterwards entered. Under it the interveners claimed from the plaintiff the amount due to the marshal for the expenses of the sale:—*Held*, that as the interveners, though able to obtain the release of the C. by giving bail had not done so, but had obtained an order for the sale of the C. and had received the proceeds of such sale, they must bear the expenses of it. The Colonsay - - 17

4. —— *Disbursements—Trial by Jury—Rules of Supreme Court, 1883, Order XXXVI., rr. 4, 6, 7a.*] The plaintiff in an action in rem for disbursements in the Probate, Divorce, and Admiralty Division, applied for an order that the action should be tried by a judge with a jury. The district registrar refused to make the order, and Butt, J., upheld his decision:—*Held*, affirming the decision of Butt, J., that Order XXXVI., r. 6, gives no absolute right to a jury in actions which before the passing of the Judicature Act, 1873, would have been tried without a jury; that the case fell within Order XXXVI., rr. 4 & 7a, and that the judge had a discretionary power only, to allow trial by a jury. The Temple Bar - C. A. 6

5. —— *Limitation of Liability—Claim against Fund in Court—Discontinuance.*] The plaintiffs having brought an action against the defendants for damage by collision, an agreement was signed by the parties as follows: "We hereby consent to this action being discontinued without costs on the ground of inevitable accident," and an order was accordingly made in the Registry for the discontinuance of the action. An action was afterwards brought by the owners of cargo on the plaintiffs' vessel against the defendants in respect of the same collision, and both ships were found to blame. The defendants obtained the usual decree limiting their liability, and paid a sum in respect of such liability into court. The plaintiffs then obtained with the defendant's consent an order from Butt, J., setting aside the order of discontinuance, and claimed in the limitation action against the fund in court:—*Held*, by the Court of Appeal, affirming the Admiralty Division, that their claim was valid, for the agreement

PRACTICE—*continued.*

and order operated as a discontinuance and not as a release of the first action.—*The Bellcairn* (10 P. D. 161) distinguished. The Ardandhu [C. A. 40

PRELIMINARY ACT—Amendment - 20
See Practice.

RULES:—

—— Order XIX., r. 28 - - - 20
See Practice.

—— Order XXXVI., rr. 4, 6, 7a - - 6
See Practice. 4.

—— Order L, r. 2 - - - - 10
See Practice. 2.

SAILING RULES—Regulations for preventing collisions, arts. 13, 18 - - 25
See Collision. 7.

—— Bye-laws—River Tyne - - 14
See Collision. 10.

—— River Tyne—Pilotage not compulsory 49
See Collision. 9.

—— Narrow channel—Entrance to Cardiff Docks
See Collision. 5. [117

SALVAGE—*Success.*] The C. broke down in the English Channel ten miles from Anvil Point, and was then in a position of risk, but not of imminent danger. The H. at her request took the C. in tow: near the Shambles the hawsers parted, and the C. then anchored and was in a position of considerable danger, greater than when the H. took her in tow. The H. was unable to make fast a hawser again, and in trying to do so came into collision with the C. The H. then left the C., which was soon after taken in tow by two tugs and brought in safety to Portland:—*Held*, that the H. was not entitled to salvage.—*The India* (1 W. Rob. 406) followed. The Cheerful - 3

SHIP—Charterparty—Charterer to pay for coals and other expenses—Action by master against vessel - - - 21
See Master. 2.

—— Disbursements—Lien of master—Priority
See Master. [120

—— Investigation into shipping casualty—Refusal of Board of Trade to order rehearing—Appeal - - - - 37
See Board of Trade.

SHIPPING CASUALTY—Board of Trade—Refusal to order rehearing—Appeal 37
See Board of Trade.

STATUTES:—

41 Geo. 3, c. 86 - - - - 49
See Collision. 9.

9 & 10 Vict. c. 93, s. 1 - - - 31
See Collision. 7.

17 & 18 Vict. c. 104, s. 187 - - 21
See Master. 2.

24 Vict. c. 10, s. 10 - - - 120
See Master.

25 & 26 Vict. c. 63, s. 39 - - - 49
See Collision. 9.

STATUTES—*continued.*

28 Vict. c. 44, sched. ss, 10, 11, 12, 16 - 49
See Collision. 9.

31 & 32 Vict. c. 78, s. 3 - - - 72
See Limitation of Liability.

36 & 37 Vict. c. 66, s. 25, sub-s. 9 - 31
See Collision. 7.

42 & 43 Vict. c. 72, s. 2, sub-ss. 1, 2 - 37
See Board of Trade.

TOWAGE—*Efficiency of Tug for Service—Exemption of Owner from Liability.*] There is an implied obligation in a contract of towage, that the tug shall be efficient and properly equipped for the service, and a proviso in the contract that the owners will not be responsible for the default of the master, does not release them from such implied obligation. The Undaunted - 46

TRIAL BY JURY—Disbursements - 6
See Practice. 4.

TUG—Efficiency for service—Exemption of owner from liability—Towage - - 46
See Towage.

TYNE—Pilotage not compulsory - - 49
See Collision. 9.

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